

THE LAW OF JOINT PROPERTY AND PARTITION
IN BRITISH INDIA



Tagore. Law Lectures—1895-96

The Law
OF
Joint Property and Partition
IN
British India

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CORRIGENDA.

- Page 41 Line 32. For "all" read "each of."
" 91 Line 4 For "defendant" read "plaintiff."
" 118 " 34. For "alienation" read "Sale."
" 37 Omit the second marginal note.
" 154 Line 4. For "from" read "by."
" 168 " 11. Omit "for the return."
" 192 " 26. For "in" read "to."
" 226 " 17. For "On this point see" read "Thus in."
" " 19. Omit "in which."
" 276 " 11. For "impartible" read "partible."
" 313 " 33. For "different" read "distinct."
" 321 Omit the third marginal note.

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The Law of Joint Property and Partition.

LECTURE I.

The Subject—divided into two parts—what is property—what is joint property—very dissimilar to English joint-tenancy—English joint-tenancy—Compared with the estate of Hindu widows—with the interest of the members of a joint family—Principal classes of joint property in British India—the result of personal laws—the Mitakshara, the Dayabhaga and the Mahomedan law—Laws to be discussed as applicable to the several classes of joint property in British India—Acts enjoining the administration of Hindu and Mahomedan Laws—Pre-emption as incident of joint property—Different schools of Hindu law grouped under two heads—Authorities in the different Schools—Several Acts of Indian Legislature have application to joint property—ordinary incidents of joint property—Impartible joint property—Law of property generally applicable to joint property—Special law of joint property—Partition—according to Mitakshara—according to Dayabhaga—Partition by separate collection of rents—Rules for partition by metes and bounds same for all property—Act IV of 1893—Law of partition of revenue-paying estates—in Bengal—in N.-W. Provinces—Oudh—Punjab—Central Provinces—Bombay—Madras—Assam—Importance of the subject.—Division of the subject into Parts, Chapters and Lectures. ;

The subject of these Lectures is “the Law of Joint Property and Partition in British India including the Procedure relating thereto.” It consists of two parts—1st the Law of Joint property in British India, and 2ndly the Law of partition of such property.

The subject.

Divided into two parts.

With a view to give you a clear idea of the nature of the discussions that I intend in these Lectures to invite your attention to, I shall in this Introductory Lecture consider the aim and scope of the subject. I shall also give you here an analysis of each of the parts into which I have divided the subject and indicate briefly the line that I shall adopt in discussing the questions in their proper place.

PART I.

The conception of Joint Property involves within it that of property in general.

What is
property?

The term "property" is used by Jurists in more applications than one. They use it to denote (1) ownership or (2) the subject of ownership—or (3) valuable things. In the first of these applications, ownership is not unfrequently considered as the aggregate of the rights of an owner, and in this sense, he only is the owner of a thing who has absolute control over the thing, whose interest is unlimited as to duration and who has the absolute power of disposal of it.

But this is taking too limited a view of the signification of the word. It seldom happens that all the rights over a thing are centred in the same person. "The distribution of rights" says Sir William Markby "detached from ownership which we actually find in use is very extensive." And yet it is the holder of the residuary right in a thing or subject of ownership, whom we in common parlance always consider as the owner of the

thing and distinguish the holders of the detached rights as owners of *particular rights*.

In all the above three applications of the word "property," the idea of a right to exclude all others from the enjoyment of the subject of ownership is predominant. In the case of public property although no one has the right to exclusive enjoyment, none can rightfully prevent another from enjoying it.

The word "property" which is used in describing the subject of these Lectures need not be restricted to the aggregate of the rights or to the residuary rights only. It properly comprehends the "detached rights" too, if I may use the expression—in short all possible combinations of rights over a thing, the subject of ownership.

I do not propose to discuss the different classifications of property. They do not legitimately form the subjects of our consideration. I proceed with the supposition that the student understands the different expressions—"real" and "personal property," "movables" and "immovables," and "corporeal" and "incorporeal rights."

When property (using the term to mean all possible combinations of rights over a thing which is the subject of ownership) is owned by more individuals than one, it is said to be the joint property of those individuals. It must be the same property or the same combination of rights over the thing, which must be the subject of joint or common ownership. It not unfrequently happens that different interests, or rights in respect of the same thing, the subject of ownership, belong to different individuals. A piece of land may be owned by *A* by tilling and reaping the crops and by *B* by receiving money-rent for it from *A*. Here *A* and *B* are owners of different rights or

What is
Joint pro-
perty.

interests and are not joint owners, though the piece of land in respect of which they enjoy the different rights is the same. But if in the case supposed instead of A and B being the exclusive owners respectively of the particular rights of tilling and reaping the crops and of receiving the money-rent, A_1 and A_2 were the co-sharers of A and similarly B_1 and B_2 of B , then A , A_1 and A_2 would have been joint proprietors and so also B , B_1 and B_2 . The joint property in the case of A , A_1 and A_2 would have been the right to till the land and reap the crops, while that in the case of B , B_1 and B_2 would have been the right to receive the rents in respect of the same land. In popular language the same land in the case supposed might be called the joint property of A , A_1 and A_2 and also of B , B_1 and B_2 ; but it would be a mistake to call A , A_1 or A_2 a joint proprietor with B , B_1 or B_2 . By the expression "joint property" therefore we understand such common ownership over a thing as belongs to two or more individuals. The common ownership must be over the same rights and interests in the subject of ownership, though it is not necessary that the extent of the right or interest of each of the owners should be the same or that there should be unity of title among the joint owners. Thus, of two joint owners one may be entitled to receive $\frac{1}{6}$ ths of rents payable by a tenant in occupation of the land and the other to the remaining $\frac{5}{6}$ ths of the same rents—the former as an heir to his father and the latter by purchase.

very dis-
similar to
English
Joint-ten-
ancy.

The expression "joint property" is of a class with the similar expression—"joint-tenancy" with which English lawyers are so familiar. But the joint property which is the subject of these Lectures is very different from the English estate known as "joint-tenancy." I shall in a future Lec-

ture point out to you in detail the points of resemblance and dissimilarity between the English estate joint-tenancy and the joint ownership of the members of a joint Mitakshara family. I shall at this stage content myself with a few words on the nature of the English joint-tenancy with a view to show that of the various classes of joint property with which we shall be concerned, only a small portion have a few of the peculiar incidents of the English joint-tenancy.

Mr. Williams in his book on Real property says:—

“A gift of land to two or more persons in joint-tenancy is such a gift as imparts to them with respect to all other persons than themselves, the properties of one single owner. As between themselves, they must, of course, have separate rights; but such rights are equal in every respect, it not being possible for one of them to have a greater interest than another in the subject of the tenancy. A joint-tenancy is accordingly said to be distinguished by unity of *possession*, unity of *interest*, unity of *title* and unity of the *time* of the commencement of such title. Any estate may be held in joint-tenancy; thus, if lands be given simply to *A* and *B* without further words, they will become at once joint-tenants for life. Being regarded with respect to other persons as but one individual, their estates will necessarily continue so long as the longer liver of them exists. While they both live, as they must have several rights between themselves, *A* will be entitled to one moiety of the rents and profits of the land and *B* to the other; but after the decease of either of them the survivor will be entitled to the whole during the residue of his life..... An estate in fee simple may also be given to two or more persons as joint-tenants. The unity of this kind of tenure is re-

English
Joint-ten-
ancy.

markably shown by the words which are made use of to create a joint-tenancy in fee simple."

And again—

"The incidents of joint-tenancy.....last only so long as the joint-tenancy exists. It is in the power of any one of the joint-tenants to sever the tenancy; for each joint-tenant possesses an absolute power to dispose, in his life time, of his own share of the lands by which means he destroys the joint-tenancy. * * * Thus if there be three joint-tenants, and any one of them should exercise his power of disposition in favour of a stranger, such stranger will then hold the undivided third part of the lands as tenant-in-common with the remaining two."

Kent in his Commentaries speaking of Joint-Tenancy says:—

"Joint-tenants are seised *per mie et per tout* and each has the entire possession, as well of every parcel as of the whole * * * The doctrine of survivorship or *Jus accrescendi* is the distinguishing incident of title by joint-tenancy; and therefore the entire tenancy or estate upon the death of any of the joint-tenants went to the survivors and so on to the last survivor who took an absolute estate of inheritance."

There is, it is true, no prohibition in the Law of this country against the creation of joint ownership having all the peculiar incidents of the English joint-tenancy. Parties may by proper instruments bring such estates into existence. But as a matter of fact such estates are unknown in British India. I shall therefore simply point out here the striking features of resemblance and dissimilarity between this English Estate, on the one hand and, on the other, the estate which two or more Hindu widows inherit under the Hindu Law from their deceased husband (polygamy not being an

Compared
with the Es-
tate of Hin-
du widows.

offence among the Hindus) or that which two or more daughters succeed to as heiresses to their father. The estate which widows or daughters jointly inherit makes the nearest approach to the English joint-tenancy. Here there is unity of *possession*, unity of *interest*, unity of *title* and unity of the *time* of the commencement of such title. The right of survivorship also obtains among the widows and the daughters. But though the analogy is close, the two estates are not exactly alike. One of several widows or one of several daughters cannot by any act of hers change the nature of the estate, as an English joint-tenant can do, nor will the law allow the heirs of the last survivor to take the entire inheritance.

I have said above that one of several widows or daughters cannot change the nature of the estate. This should be understood with certain reservations. One of several* widows, as one of several daughters, can for legal necessity and with the consent of her coparceners alienate any portion of her undivided interest in her coparcenary property and the purchaser may acquire an interest to which the right of survivorship may not attach and which may be partitioned off from the shares of the other widows or daughters. But if the alienation be without legal necessity, the other widows or daughters, unlike an English joint-tenant, would not lose their rights of survivorship.

Joint-tenancy is not unfrequently compared to the interest of the members of a joint Mitakshara family in their joint property. But I shall in a subsequent lecture shew that though in a Mitakshara family there is unity of *possession* and the whole

Compared with the interests of the members of a joint family.

family may be looked upon as one person, as in the case of joint-tenants under the English Law, in other respects, the two estates differ very widely.

From the above definition of joint property it follows that the subjects of joint ownership may be as various as the subjects of ownership. In short all kinds of property that may be the subjects of individual ownership may also be joint property.

Principal
classes of
joint pro-
perty in
British
India.

By the phrase "British India" we denote "the territories which are for the time being vested in Her Majesty, by Statute 21 and 22 Victoria Chapter 106 entitled 'An Act for the better government of India' except the Settlement of Prince of Wales' Island, Singapur and Malacca." These territories are vast in extent and are inhabited by various races of men of different religious persuasions, Hindus and Mahomedans, Europeans and Eurasians. Some of these people have their peculiar modes of holding property under their own class or personal laws. Thus the Mitakshara Joint-family-system under which men descended from a common ancestor live with their wives in the enjoyment of ancestral property gives rise to a large class of joint property. Then again, as the principles of primogeniture do not obtain in India as a rule, whenever on the opening of a succession more persons than one are the heirs, joint ownership is the result. Of the various classes of joint property, therefore, that prevail in British India the principal are the result of the personal (class) laws that govern the people, while the rest are the creation of the people themselves. As to this latter class of joint properties which are the creation of the parties themselves, they are various in their nature. Their incidents depend upon the contracts whereby they are created and will not form

The result
of person-
al laws.

the subjects of our consideration except such as are very common.

As regards the former class of joint properties which are the result of the personal laws of the people, they are chiefly of three kinds—(1) those that arise under the Mitakshara Law, (2) those under Dayabhaga Law and (3) those under the Mahomedan Law. In dealing with the subject of joint property under the Mitakshara Law, I may have to refer to texts which are held as special authorities in the Mithila, the Maharashtra and the Dravida School of Hindu Law.

1. Mitakshara.
2. Dayabhaga.
3. Mahomedan Law.

A rational treatment of the subject of ordinary Joint Property would consist in discussing the rules and laws which the proprietors must conform to in enjoying the property, and in transferring it by lease, mortgage, gift, sale or will. It would further consist in formulating the rules of succession to the property upon the death of one or more of its proprietors, in pointing out the periods of limitation applicable to suits in connection with such properties, in indicating the procedure to be adopted in such suits and also in suits for partition, in discussing the rights and liabilities of individual proprietors before partition, and in ascertaining their shares at partition. But, as I shall show you hereafter, the joint property of a Mitakshara family has its peculiar incidents. It is such that before partition no member has any definite share in the property. The whole family is looked upon as one individual. There is properly no succession upon the death of any member of the family: the survivors continue in possession as before. Individual rights which had no previous existence spring up all at once at partition. All the members are not entitled to share at partition and the shares again, which then for the first time come into existence, are not equal.

Laws to be discussed as applicable to the several classes of joint property in British India.

Though fluctuations in the number of the members of a family, caused by births and deaths in the family make no change in the status of the members while the family is joint, their effect is for the first time seen in determining the shares of the members at a general partition of property. Add to this, the courts of law in some of the Provinces have made a distinction between private sales by individual members before partition and compulsory sales in execution of decrees of courts. On account of these peculiarities, besides discussing the ordinary questions above suggested, I shall have to consider at length the peculiar incidents of this kind of property as settled by the case-law on the subject and also the privileges and liabilities of the managers or *kurtas* of joint families.

Now that I have in a general manner indicated the mode of my treatment of the subject, let me take you to the particular branches of Law that I shall have to draw your attention to as applicable to our subject.

Acts en-
joining the
administra-
tion of Hin-
du and Ma-
homedan
Laws.

By the Declaratory Act of 1781, Section 17 it was enacted "with regard to the native inhabitants of Calcutta that their inheritance and succession to lands, rents and goods and all matters of contract and dealing between party and party should be determined in the case of Mahomedans by the laws and usages of Mahomedans and in the case of Gentoos by the laws and usages of Gentoos &c." Similarly when the Supreme Courts were established at Bombay and Madras, the native laws were made applicable to the natives of Bombay by Section 29 of 4 George IV. C. 71, and to the natives of Madras by Section 22 of 40 George III C. 79. The Charters by which the present High Courts have been substituted for the old Supreme Courts in the Presidency Towns have,

no doubt, repealed the previous Acts but they have allowed by express words the old state of things to continue.

As regards the mofussil, the law is to the same effect and is contained in the following Acts.

1. For Bengal, North-Western Provinces and Assam, Act XII of 1887 Sec. 37.
2. For Lower Burmah, Act XI of 1889 Sec. 4, which makes also the Buddhist Law applicable to the Buddhists.
3. For Bombay, Reg. IV of 1827 Sec. 26.
4. For Madras, Act III, of 1873 Sec. 16.
5. For Central Provinces, Act XX of 1875 Sec. 5.
6. For Oudh, Act XVIII of 1876 Sec. 3.
7. For Punjab, Act IV of 1872 Sec. 5.

These Statutes also recognize well-established local customs as having the force of laws under certain conditions.

It is a fortunate circumstance that the local customs, which the Statutes, above referred to, enjoin our courts of law to observe, have not any influence in moulding the incidents of joint property, beyond introducing the Mahomedan Law of Pre-emption among the Hindus in some localities. I call this a fortunate circumstance, because, with a few exceptions there are hardly any authentic collections of local customs.

Pre-emption as incident of joint property.

The principles of Law, therefore, that I shall have to consider in these Lectures as applicable to the joint property which is the result of the personal laws of the people, will be the Hindu and the Mahomedan Law of joint property.

In considering the incidents of joint property under the Mahomedan Law, I shall discuss the law of pre-emption so far as the Mahomedan Law and Hindu customs have made the same applicable to both the classes of people.

Then as regards the Hindu Law, I intend to discuss the incidents of joint property under two

Different
schools of
Hindu Law
grouped
under two
heads.

heads—the Mitakshara and the Dayabhaga. There are, it is true, five principal schools of Hindu Law, three in the north and two in the south of India—those in the north being the Bengal, the Mithila and the Benares School and those in the south the Dravida and the Maharashtra School. But though the schools are so numerous, the principles of law they inculcate are, with a few exceptions, common to them all and for practical purposes the Mitakshara is the Hindu Law for the whole of India except Bengal, where the Dayabhaga of Jimutvahana is the law.

I assume you are aware that the Smritis (institutes) of the Rishis are universally respected. It is only their particular commentaries that are held in greater or less esteem in particular localities. The Mitakshara is a commentary by Vijnaneswara on the Institutes of Yajnavalkya. It is a work of paramount authority in the whole of India except Bengal, and even in Bengal it is referred to and followed as a guide to settle doubtful questions of law on which the Dayabhaga is silent. *

I have said that the Mitakshara is a work of paramount authority in the different schools of Hindu Law. It is no part of my subject to consider what the other authorities are in the different schools and which of them, in the event of a conflict of opinions, are preferred to the others of them. Mr. Herbert Cowell and successive Law Lecturers have dwelt on that subject and I shall content myself with simply enumerating here

* See the observations of the Judicial Committee in *Bhugwandeon Doohey v. Myna Bae* (1868) 11 M. L. A. 487.

the various works of authority in the different schools, as I may have to refer to some of them at least.

Bengal School	<ol style="list-style-type: none"> 1. Dayabhaga. 2. Raghunundun's treatise. 3. Dayakrama Sangraha. 4. Srikrishna's Commentaries. 5. Dattaka Chandrika. 	Authorities in the dif- ferent schools.
Mithila School	<ol style="list-style-type: none"> 1. Mitakshara. 2. Vivada Chintamani. 3. Vivada Ratnakara. 4. Dvaita Nirṇaya. 5. Sudhiviveka. 6. Dvaita Parishista. 7. Dattaka Mimansa. 	
Benares School	<ol style="list-style-type: none"> 1. Mitakshara. 2. Vira Mitrodaya. 3. Nirṇaya Sindhu. 4. Dattaka Mimansa. 	
Dravida School	<ol style="list-style-type: none"> 1. Mitakshara. 2. Smṛiti Chandrika. 3. Parasara Madhavya. 4. Sarasvati Vilasa. 5. Dattaka Chandrika. 	
Maharashtra School	<ol style="list-style-type: none"> 1. Mitakshara. 2. Vyavahara Mayukha. 3. Nirṇaya Sindhu. 4. Dattaka Mimansa. 5. Kaustava. 	

But the Hindu and the Mahomedan Law of joint property are not all the law that we shall have to discuss. Under the British Administration the Hindu Law is not the law which determines all the rights and liabilities of a Hindu. Nor does the Mahomedan Law determine all the rights and liabilities of a Mahomedan. In matters of contract, of civil rights as landlord or tenant, of obligations to the Government of the country and, in short, in

Several Acts of Indian Legislature have application to joint property.

all questions save such as relate to inheritance, marriage and succession, the legislative enactments passed from time to time govern the position of a Hindu and a Mahomedan. In connection therefore with the subject of joint property it is not only the Hindu or the Mahomedan Law but the statutes passed from time to time that we have to consider in determining the various incidents of such property. To take a concrete example: Suppose a Mitakshara family in Bengal composed of a father and two sons is possessed of an ancestral holding for which rent has to be paid to the landlord, and suppose the father is desirous of selling the holding. The question whether the alienation of the holding by the father would bind the sons would have to be determined by the provisions of the Mitakshara Law; while the question whether the transfer would be good against the landlord would depend upon the provisions of the Bengal Tenancy Act. It is only the first of these questions that properly forms the subject of our consideration; for, the answer to the second question does not depend upon the incidence of the property, joint or exclusive. Take another example. Suppose a family consisting of an uncle and two nephews (sons of a deceased brother) governed by the Dayabhaga have jointly inherited from their ancestor a jote for which a certain rent has to be paid annually to the landlord, and suppose the uncle wishes to keep the jote entire while the nephews wish to split it up. The question of the division into shares has to be decided under the Dayabhaga while the question whether the zemindar would be bound to recognize the division would be one under the Bengal Tenancy Act. In this case both the questions would be proper subjects for our discussion.

Thus it is clear that portions of the Law of

Limitations, of the Civil Procedure Code, of the Tenancy Acts and of the Transfer of Property Act have important bearing on the subject of these Lectures and I shall have to discuss these provisions at some length.

Then, as I said before, some of the incidents of joint property that owe their origin to contracts are so common, that the present Lectures will not be complete without our discussing them. A man purchases a fractional share of some lands from another who is the exclusive proprietor of them. By reason of his purchase, the former becomes a joint proprietor with the latter. Suppose now that the two proprietors cannot agree between themselves as to how the lands should be enjoyed. What must they do? Or, suppose one of the co-sharers without the consent, express or implied, of the other builds a pucca house on the entire lands or on a portion thereof. What is the remedy of the other co-sharer? Or, suppose the lands previous to the purchase were in the occupation of ryots who were not protected from enhancement of their rents, and the purchaser after his purchase of a fraction wishes to enhance the rents payable by the ryots, while his co-sharer does not so wish. What must the co-sharer do? Or suppose one of the two proprietors wishes to eject a tenant, while the other does not so wish. What course must the proprietor who wishes to eject adopt? Or, suppose a co-sharer at a considerable expense raises a crop of indigo on his sole account. Would his co-sharer be entitled to share with him in the profits? It not unfrequently happens that joint property in which the shares are defined while in the occupation of the proprietors, is considerably improved by one of them at his own expense to suit his convenience. Would the proprietor who improves get, at a general partition, credit for his

Ordinary incidents of joint property.

improvement, if there was no understanding among the sharers to that effect? We may also suppose cases where one co-sharer, without actually interdicting the use by his co-sharers of the joint property, may so use it as to make it, by laying out capital on his sole account, a source of profit. Would his co-sharers be entitled to share in the profits? We need not here multiply instances. Then again a trading concern is a joint property of the partners. The rights and liabilities of the joint proprietors—the partners—which are determined by the Contract Act, ought to have a place in these Lectures.

We shall consider these and similar questions in a separate chapter.

Impartible
joint prop-
erty.

It yet remains for me to notice that there are some estates which though not partible are joint. By their very constitution they are capable of being enjoyed by only one person at a time, the other co-sharers simply receiving maintenance from the holder. The Law of primogeniture generally obtains in these cases; otherwise, the *kulachar* of the family (immemorial family custom) supplies the rules of descent. The joint character of the property is evidenced, in several cases, by the exclusion of females from succession and by the restrictions placed on alienations by the holder of the estate for the time being. I shall consider this class of joint property last.

Law of prop-
erty gene-
rally appli-
cable to
joint prop-
erty.

I have already said that all classes of property may form the subjects of joint ownership. From this, it follows that the law applicable to property in general applies equally to joint property, with this difference that whereas in the case of other properties the owners would be single individuals, in the case of joint properties the owners would be the whole body of proprietors collectively. Viewed in this light, the whole of the law of property would

be applicable to joint property too. Thus if a person who is the exclusive owner of a thing must sue to recover possession, within a certain period of his dispossession, within the same period must a suit for the same purpose be brought if the thing, previous to dispossession, was owned by a number of individuals; only that in this latter case, the whole body of proprietors must sue unless the law would allow any one of them to sue on behalf of the whole body. So also the procedure to be followed for the recovery of the property by suit would be the same whether it belonged to one or more individuals.

But beside the body of general law applicable to joint property in common with other kinds of property, there are some special laws of procedure, limitations &c. applicable only to joint property; as, the law applicable to disputes among the joint owners themselves; the law which allows one of several joint owners under certain circumstances to sue on behalf of others; the law of Limitations applicable to the suit of one co-sharer against another &c. &c. It is these laws only that properly form the subjects of our discussion. Otherwise it is not the scope of these Lectures to discuss or consider the whole body of laws, general or special, that may have to be applied to joint property under any circumstances.

Special law
of joint
property.

PART II.

Partition.

The second branch of our subject is the Law of partition of joint property in British India.

According
to Mitak-
shara.

The word "partition" is differently understood in the different schools of Hindu Law.

According to Mitakshara, "partition is the adjustment of divers rights regarding the whole by distributing them on particular portions of the aggregate. Before partition the right of each co-owner extends over the whole property. The effect of partition is to create in favour of each co-owner an exclusive right to a part in lieu of the joint right which he previously possessed over the whole." Col. Mit. I., 1, 4. As to what constitutes a partition under the Mitakshara, Lord Westbury in delivering the judgment * of the Privy Council in *Appoovier v. Ramasubha Ayyan* observed.—"According to the true notion of an undivided family, no individual member of that family, whilst it remains undivided, can predicate of the joint undivided property that he that particular member has a certain definite share. The proceeds of undivided property must be brought, according to the theory of an undivided family, to the common chest or purse and then dealt with according to the modes of enjoyment of the members of an undivided family. But when the members of an undivided family agree among themselves with regard to particular property, that it shall thenceforth be the subject of ownership in certain definite shares, then the character of undivided property and joint enjoyment is taken away from the subject matter so agreed to be dealt with, and in the estate each member has

thenceforth a definite and certain share, which he may claim a right to receive and to enjoy in severalty, although the property itself has not been actually severed and divided." According to another authority, "even when there is a total absence of common property a partition is effected by a mere declaration, 'I am separate from thee;' for partition is but a particular condition of the mind; and this declaration is indicative of the same." Under the Mitakshara, partition is the origin of property; before partition no member has a definite share, and then there is no succession and the joint family-property upon the death of one member continues the same joint family-property of the survivors. After partition, the share received by any member becomes his property, and it passes to his heirs at his death according to certain rules of succession. The females who would not inherit any interest in joint property would be entitled to succeed to the shares of their fathers or husbands if these die after separation. Thus, very important consequences follow the partition of joint properties in a Mitakshara family.

According to Dayabhaga, "partition is the allotment of separate portions of the family property to the co-sharers corresponding to the shares already owned by each. By a partition, an allotment is made in respect of the share of a coparcener." From the above definition it follows that partition in Bengal is generally a partition by metes and bounds. The shares of the members of an undivided Dayabhaga family are always defined, and the separation or division is complete upon the separate enjoyment of their shares by the members in whatever way this may be done.

The Dayabhaga definition would generally apply to partition under the Mahomedan Law.

According
to Daya-
bhaga.

I shall therefore, in my first lecture on this part consider the Mitakshara Law of partition; that is (1) what amounts to a separation or partition under the Mitakshara Law, (2) who can demand a partition of coparcenary property and when, (3) who would be entitled to share at partition and what would be their shares, and (4) the legal consequences of partition.

In my next Lecture on this Part, I shall discuss the Law of Partition under the Dayabhaga and the Mahomedan Law.

**Partition
by separate
collection
of rents**

You must have seen that in Bengal, as elsewhere, co-sharers do not, as a rule, divide among themselves by metes and bounds, landed properties of which they enjoy possession by receipt of rents from the tenants in occupation. They generally divide the rents, after they have been collected, in proportion to their shares on paying the collection charges jointly, or they separately collect their shares of the rents from the tenants direct. This is also a mode of partition and all the legal consequences of a partition attach to such a division.

**Rules for
partition
by metes
and bounds
same for
all pro-
perty.**

The rules for actual division of joint properties by metes and bounds, as well as for the allotment of some entire properties to any sharers after providing for the payment of owelty-money, with a view to make the shares equal or equivalent to their proportionate money-value are the same for all classes of people and for all kinds of joint property, save the revenue-paying estates. But until lately there was no legislative enactment of general application, throughout the whole of British India, authorizing the civil courts, in suits for partition, to sell the whole or a portion of the property under partition in order to prevent inconvenient divisions. The Act I refer to is No. IV of 1893. It provides a procedure for the sale of all classes of immovable property to which the provisions of Sec.

**Act IV of
1893.**

396 of the Civil Procedure Code apply *i. e.*, all property save the revenue-paying estates for which a separate procedure is prescribed in other Acts. I shall have to consider the provisions of this Act IV of 1893, as well as those of Sec. 396 above mentioned, in a subsequent Lecture.

There is yet another kind of landed interest for which a special procedure has to be followed in effecting a division among co-sharers by metes and bounds—I mean the revenue-paying estates. In respect to these properties, besides the joint owners of the estates, there is always the interest of a third party to be considered—the interest of the Government to whom the revenue is payable. In case of a disproportionate division, the Government would lose their security for the revenue and accordingly the Legislature has provided that the apportionment of the Government revenue among the different allotments into which an estate may be divided at partition must be made only by the Revenue officers of the Government.

Law of
partition of
revenue-
paying es-
tates

For the partition of Revenue-paying Estates in Bengal, an elaborate procedure is prescribed by the Bengal Council Act VIII of 1876 supplemented by rules framed by the Board of Revenue.*

in Bengal.

The Law of partition of Revenue-paying and Revenue-free mahals in the N.-W. Provinces is contained in Act XIX of 1873.

N.-W. Pro
vinces.

The Law of partition of revenue-paying and revenue-free mahals as well as taluqdary and underproprietary mahals in Oudh is contained in Act XVII of 1876.

Oudh.

The Law of partition of revenue-paying estates in the Punjab is contained in Chapter IX Act XVII of 1887.

Punjab.

* There is at the present time a Bill before the Bengal Council for the amendment of the procedure prescribed in this Act.

**Central
Provinces.**

The Law of partition of revenue-paying estates in the Central Provinces is contained in Act XVIII of 1881 as amended by Act XVI of 1889.

Bombay.

The Law for the partition of revenue-paying estates in Bombay is contained in Bombay Act V of 1879 Sections 113-117, subject to the provisions of Bombay Act V of 1862 entitled "an Act for the preservation of Bhagdari and Narwadari Tenures."

Madras.

The Law for the partition of revenue-paying estates in Madras is contained in Act II (Madras) of 1864, Sections 45 and 46 and Act I (Madras) of 1876 and some earlier Regulations.

Assam.

The Law for the partition of revenue-paying estates in Assam is contained in Chapter VI, Regulation I of 1886.

We shall have to consider all the above Statutes.

**Importance
of the sub-
ject.**

By far the largest portion of landed property in India is held as joint family-property. Here, unlike other countries, joint ownership is the rule, while individual proprietary right is the exception. That aggregate ownership is an archaic institution, and individual proprietary right, a modern development of it, is evidenced by the comparative ages of the Mitakshara and the Dayabhaga. The former, which is an ancient work, treats elaborately of the subject of joint ownership, while the latter gives prominence to individual right. The observations of Sir Henry Maine in his work on Ancient Law and of Mr. Mayne in his work on Hindu Law and Usage fully bear out the prevalence and the ancient origin of this system of holding property, and I shall take liberty to quote those observations.

Sir Henry Maine says :—*

"The mature Roman Law, and modern juris-

prudence following in its wake, look upon co-ownership as an exceptional and momentary condition of the rights of property. This view is clearly indicated in the maxim which obtains universally in Western Europe, *Nemo in communione potest invitatus detineri* ("No one can be kept in co-proprietorship against his will"). But in India this order of ideas is reversed and it may be said that separate proprietorship is always on its way to become proprietorship in common. * * *

* As soon as a son is born, he acquires a vested interest in his father's substance, and on attaining years of discretion he is even, in certain contingencies, permitted by the letter of the law to call for a partition of the family estate. As a fact, however, a division rarely takes place even at the death of the father and the property constantly remains undivided for several generations though every member of every generation has a legal right to an undivided share in it. The domain thus held in common is sometimes administered by an elected manager, but more generally, and in some provinces always, it is managed by the eldest agnate, by the eldest representative of the eldest line of the stock. Such an assemblage of joint proprietors, a body of kindred holding a domain in common, is the simplest form of an Indian Village Community, but the community is more than a brotherhood of relatives and more than an association of partners."

Mr. Mayne speaking of the antiquity of the joint family system, says:— *

"The joint family is only one phase of that tendency to hold property in community, which, it is now proved, was once the ordinary mode of tenure. The attention of scholars was first drawn

to this point by the Slavonian village communities. But it is now placed beyond doubt that joint ownership of a similar character is not limited to Slavonian or even to Aryan races, but is to be found in every part of the world where men have once settled down to an agricultural life."

Even the most careless observer, at every step of his progress through India, would be struck at the general prevalence of the system of living in family groups. The reports of the proceedings of our Courts of law teem with cases of joint ownership. The law of joint property, therefore, has here an importance which it has not in other countries.

The same may be said of the law of partition. We have seen that by far the largest portion of the Hindus are governed by the Mitakshara law and that under that law very important consequences are attached to a partition. From this it follows that the law of partition too cannot but be of immense interest to the people—not to speak of its importance to one who has to administer the law to the people, or to one who has to practise as a lawyer in the Courts of the country.

Division of the Subject.

PART I.

**THE LAW OF JOINT PROPERTY IN
BRITISH INDIA.**

Division
of the sub-
ject into
parts,
chapters &
lectures.

CHAPTER I.

Lecture II.

Joint Property under the Mitakshara Law. •

Lecture III.

• The Law of alienations of joint ancestral property under the Mitakshara Law and of the liability of such property for payment of debts in certain cases.

CHAPTER II.

Lecture IV.

Joint Property under the Dayabhaga.

CHAPTER III.

Lecture V.

Mahomedan Law of Joint Property together with the Law of pre-emption among co-sharers.

CHAPTER IV.

Lecture VI.

Ordinary incidents of several kinds of Joint Property and the principal doctrines of equity applicable to such property.

CHAPTER V.

Lecture VII.

The Law of Limitations and Procedure applicable to suits in respect of Joint Property.

CHAPTER VI.

Lecture VIII.

Impartible Joint Estates.

PART II.**THE LAW OF PARTITION.**

CHAPTER I.

Lecture IX.

The Law of Partition under the Mitakshara.

CHAPTER II.

Lecture X.

Partition under the Dayabhaga as well as under the Mahomedan Law.

CHAPTER III.

Lecture XI.

The general law of Partition of all classes of Joint Property except Revenue-paying Estates.

CHAPTER IV.

Lecture XII.

Procedure for partition of Revenue-paying Estates in Bengal.

Lecture XIII.

Procedure for partition of Estates in the N.-W. Provinces, Oudh, Punjab, the Central Provinces, Assam and the Presidencies of Madras and Bombay.

LECTURE II.

Joint Property under the Mitakshara.

Early Law of joint property—Patriarchal family—Joint family—Origin of Village Communities—Partition of property, a later development—Extent of patriarch's power—Son's property father's—Changes gradually introduced in respect of father's powers—Curtailment of parental authority—Transition from Status to Contract—Analogies between Roman and Hindu Jurisprudence—Relics of Village Communities in India—Communal Zemindary System—Pattidari System—Bhaichari System—Relics of village communities in full force—they seem destined so to continue under British rule—Constitution of the Hindu Joint family—Affiliation by adoption—Who are Coparceners—Shares of Coparceners definite in Bengal—Not so, under the Mitakshara till a partition is effected—Treatment of the subject of partition in the Mitakshara—Partition is origin of property—All who are entitled to share at partition cannot demand partition—Who are the persons who acquire a vested interest—"Obstructed and unobstructed heritage"—Great-grandson an unobstructed heir though not expressly mentioned as such in the Mitakshara—All who take vested interest cannot demand partition—Grandson cannot demand partition during lifetime of his father and grandfather—Peculiar signification of the word coparceners in the Mitakshara—Adopted sons—Sons by women of different tribes—Son begotten by Sudra on female slave—Sons, Grandsons and Great-grandsons the coparceners—provided they are not disqualified—Summary—Cases—Survivorship—Right of sons to ancestral property by birth—Right of grandsons to partition—The word "sons" in Mitakshara does not include grandsons—What is coparcenary property—Distinguishing features of such property—Ancestral property—Son cannot compel father to partition property inherited collaterally—Son cannot control father's acts in respect of such property—Share of ancestral property received at partition is ancestral property as regards issue—Property received by son as gift or under will, ancestral property or not—Test for determining the point—Property purchased from profits of ancestral property—Even when the purchase was made before birth of a son—Ancestral movables converted into immovables—Instances of property not coparcenary—Collateral inheritance—Separate acquisition without use of ancestral property—What amounts to spending of patrimony—Marriage presents—Ancestral property recovered without help of joint family property—Reported cases on the point—Gains of

Science—Reported cases on the point—Grants from sovereign—Savings made by proprietor for time being of impartible estate—Members of joint family entitled to maintenance—General question of maintenance is not subject of consideration—Maintenance connected with partition—Texts as to who are entitled to maintenance—Rights of daughter-in-law and sister-in-law—of coparceners—Persons entitled to maintenance without reference to ancestral property—Members expressly excluded from inheritance—Widow and unmarried daughter of a deceased undivided brother and widowed daughter-in-law—Unmarried sister—Reported cases on the subject of maintenance—Moral obligation of a person becomes a legal obligation of his son when he inherits paternal property—Adult sons only when they are coparceners—Sons by concubines—Unchastity forfeits maintenance—Charge for maintenance—when claim based on possession of ancestral property—when not so based—Can property be followed in the hands of third parties—when specific charge has been created—when not created—Case of gifts—of devise—of sale—when portion of property remains in family, purchaser cannot be followed—Family dwelling house—Joint family compared with corporation—Contrasted with partnership concern—Mode of enjoyment of joint property—in families under the leadership of father—in other families—Liability of Kurta to account—Principle on which account should be taken—Reason of the rule as regards adult members—Powers of managers in certain cases—Minor co-sharers—Revival of barred debts—Minor co-sharer wrongfully ejected by manager—Alienations by manager—Presumption as to property purchased in the name of a member of the family—Presumption when purchased in the name of a female member—Onus of proof as to joint family—Presumption as to jointness—The presumption may be rebutted—Possession of one member to be presumed possession of family—Ancestral trade—Minors bound like adults by manager's transactions in reference to ancestral trade—No difference in this respect between Mitakshara and Dayabhaga—Limit of minor's liability—Incidents of partnership not determined solely by Contract Act—Death of a partner effects no dissolution—Outgoing partner entitled to share only in existing assets after disbursement of existing liabilities—Whether succession certificate is necessary upon death of a partner—Act VIII of 1890—Act XL of 1858—Certificate cannot be granted to manage the undivided interest of a minor.

The early law of joint property in India would be the early law of property in general. For, in the dawn of history all property everywhere was joint, and in India, as elsewhere, the property consisted of the same description of things—pasture-

Early law of
Joint pro-
perty.

grounds, cattle, &c., &c. Sir Henry Maine in his work on "Ancient Law" has shewn that the view of the primeval condition of the human race which is known as the Patriarchal theory is established by the evidence derived from comparative Jurisprudence, and he says* that "the legal testimony, comes nearly exclusively from the institutions of societies belonging to the Indo-European stock, the Romans, Hindoos and Slavonians supplying the greater part of it." But though the primitive condition of man was everywhere the same, what strikes us at the present moment is that some countries are considerably in advance of others in point of civilization. This is neither the place nor the occasion to enter into a disquisition on the causes that lead to such results. "The difference between the stationary and progressive societies is one of the great secrets which enquiry has yet to penetrate." Speaking of the expansion of law in India, Sir Henry Maine says† "We can see that Brahminical India has not passed beyond a stage which occurs in the history of all the families of mankind, the stage at which a rule of law is not yet discriminated from a rule of religion."

Patriarchal family.

In the natural order of events, the patriarchal family, consisting of the father and his sons and in which the influence of the father (the *paterfamilias*) was supreme, must have preceded the joint family and the village community. Upon the death of the patriarch or the father, the family consisted of brothers and their sons, and when they chose to live together, they lived as a joint family. The joint family thus became the second stage of living in groups. The eldest of the brothers, as the head of the family, swayed all its

Joint family

* p. 123.

† p. 32.

affairs; but his influence was very different from that of the father in a Patriarchal family. In the infancy of the world, when hunting was a man's chief occupation and his wants were few, the families naturally grouped together for their own protection from the inroads of their neighbours, and hence arose the system of village communities.

Origin of
village com-
munities.

As time advanced the individual members of the village communities, *viz.*, the joint families therein comprised, saw that the disadvantages of their combinations outweighed their advantages and began to separate.* So again, in course of time the practice of living in joint families has been giving way to the ideas of greater comforts in separate living with greater freedom of action.

Partition of
property a
later deve-
lopment.

As the peculiar nature of living together in patriarchal and family groups as well as in communities was everywhere the same and as several of our present laws owe their origin to this mode of living in ancient times, I will read to you certain passages on the subject from Sir Henry Maine's work on "Ancient Law."

Speaking of the primitive family, he says* "The points which lie on the surface of the history are these:—The eldest male parent—the eldest ascendant—is absolutely supreme in his household. His dominion extends to life and death, and is as unqualified over his children and their houses as over his slaves; indeed the relations of sonship and serfdom appear to differ in little beyond the higher capacity which the child in blood possesses of becoming one day the head of a family himself. The flocks and herds of the children are the flocks and herds of the father, and the possessions of the parent, which

Extent of
patriarch's
power.

Son's
property
father's

he holds in a representative rather than in a proprietary character, are equally divided at his death among his descendants in the first degree, the eldest son sometimes receiving a double share under the name of birth-right, but more generally endowed with no hereditary advantage beyond an honorary precedence." Speaking of the change gradually brought about in the position of the son from one of absolute dependance on the father, that eminent Jurist says*—"So far as regards the person, the parent, when our information commences, has over his children the *jus vitæ necisque*, the power of life and death, and *a fortiori* of uncontrolled corporal chastisement; he can modify their personal condition at pleasure; he can give a wife to his son; he can give his daughter in marriage; he can divorce his children of either sex; he can transfer them to another family, by adoption and he can sell them. Late in the Imperial period we find vestiges of all these powers, but they are reduced within very narrow limits. The unqualified right of domestic chastisement has become a right of bringing domestic offences under the cognisance of the civil magistrate; the privilege of dictating marriage has declined into a conditional veto; the liberty of selling has been virtually abolished, and adoption itself, destined to lose almost all its ancient importance in the reformed system of Justinian, can no longer be effected without the assent of the child transferred to the adoptive parentage. In short, we are brought very close to the verge of the ideas which have at length prevailed in the modern world. But between these widely distant epochs there is an interval of obscurity, and we can only guess at

Changes
gradually
introduced
in respect
of father's
powers

the causes which permitted the Patria Potestas to last as long as it did by rendering it more tolerable than it appears. The active discharge of the most important among the duties which the son owed to the state must have tempered the authority of his parent, if they did not annul it. We can readily persuade ourselves that the paternal despotism could not be brought into play, without great scandal, against a man of full age occupying a high civil office." And again* "many of the causes which helped to mitigate the stringency of the father's power over the persons of his children are doubtless among those which do not lie upon the face of history. We cannot tell how far public opinion may have paralysed an authority which the law conferred; or how far natural affection may have rendered it endurable. But though the powers over the persons may have been latterly nominal, the whole tenour of the extant Roman jurisprudence suggests that the father's rights over the son's *property* were always exercised without scruple to the full extent to which they were sanctioned by law. There is nothing to astonish us in the latitude of these rights when they first show themselves. The ancient law of Rome forbade the Children under Power to hold property apart from their parent, or (we should rather say) never contemplated the possibility of their claiming a separate ownership. The father was entitled to take the whole of the son's acquisitions, and to enjoy the benefit of his contracts, without being entangled in any compensating liability. So much as this we should expect from the constitution of the earliest Roman Society; for we can hardly form a notion of the primitive family group unless we

Curtail-
ment of
parental
authority.

suppose that its members brought their earnings of all kinds into the common stock, while they were unable to bind it by improvident individual engagements. The true enigma of the *Patria Potestas* does not reside here, but in the slowness with which these proprietary privileges of the parent were curtailed, and in the circumstance that, before they were seriously diminished, the whole of the civilised world was brought within their sphere. No innovation of any kind was attempted till the first years of the Empire, when the acquisitions of soldiers on service were withdrawn from the operation of the *Patria Potestas*, doubtless as part of the reward of the armies which had overthrown the free commonwealth. Three centuries afterwards the same immunity was extended to the earnings of persons who were in the civil employment of the state. Both changes were obviously limited in their application, and they were so contrived in technical form as to interfere as little as possible with the principle of *Patria Potestas*. A certain qualified and dependent ownership had always been recognised by the Roman law in the perquisites and savings which slaves and sons under power were not compelled to include in the household accounts, and the special name of this permissive property, *Peculium*, was applied to the acquisitions newly relieved from *Patria Potestas*, which were called in the case of soldiers *Castrense Peculium*, and *Quasi-Castrense Peculium* in the case of civil servants. Other modifications of the parental privileges followed, which showed a less studious outward respect for the ancient principle. Shortly after the introduction of the *Quasi-Castrense Peculium*, Constantine the Great took away the father's absolute control over property which his children had inherited from their mother, and reduced it to a *usufruct* or life-

interest. A few more changes of slight importance followed in the Western Empire, but the furthest point reached was in the East, under Justinian, who enacted that unless the acquisitions of the child were derived from the parent's own property, the parent's right over them should not extend beyond enjoying their produce for the period of his life."

And again* "Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of Individuals. In Western Europe the progress achieved in this direction has been considerable. Thus the status of the Slave has disappeared—it has been superseded by the contractual relation of the servant to his master. The status of the Female under Tutelage, if the tutelage be understood of persons other than her husband has also ceased to exist; from her coming of age to her marriage all the relations she may form are relations of contract. So too the status of the Son under Power has no higher place in the law of modern European societies. If any civil obligation binds together the Parent and the child of full age, it is one to which only contract gives its legal validity. The apparent exceptions are exceptions of that stamp which illustrate the rule. The child before years of discretion, the orphan under guardianship, the adjudged lunatic, have all their

Transition
from status
to contract.

capacities and incapacities, regulated by the Law of persons."

**Analogies
between
Roman and
Hindu juris-
prudence.**

I have quoted these passages at length in the hope that, if you follow me closely in what follows, you will not fail to perceive the close analogy that exists between these ancient laws and the laws of modern India. There is the same injunction on a son to obey his father's mandates. There is the same interdiction against a father's alienation of joint family-property to the destitution of his children. There is the same power given to a father over his son's acquisitions. There is the same declaration of the incompetency of women to hold property. There is the same incorporation of strangers into the family by adoption. There is the same exemption, of property acquired without detriment to paternal property, from the father's control.

**Relics of
village com-
munity in
India.**

Professor Krishna Kamal Bhattacharyya in his Tagore Law Lectures for 1884-85 on the Joint Hindu Family has shewn that in India, as elsewhere, village communities existed in former days, and that even at the present day in the Province of Madras, the High Court of that Presidency has to decide cases in which collective ownership in the village lands and the custom of periodical redistribution of the arable soil, (which are the characteristics of a village community, pure and simple), are asserted by parties to suits. Professor Julius Jolly in his Tagore Law Lectures for 1883 speaking* of the various forms of joint family in India says.—

"The vast continent of India may be said to exhibit an epitome of all possible forms of ownership, from the corporate property of the village community to the absolutely private property of the individual."

Mr. Mayne in his learned work on Hindu Law and Usage also speaks of the existence of village communities in the Punjab and traces the right of pre-emption to them. He says* "Three forms of the corporate system of property exist in India; the Patriarchal Family, the Joint Family and the Village Community. The two former, in one shape or other, may be said to prevail throughout the length and breadth of India. The last still flourishes in the north-west of Hindostan. It is traceable, though dying out, in Southern India. It has disappeared, though we may be sure it formerly existed, in Bengal and the upper part of the peninsula." And again "the Village system of India may be studied with most advantage in the Punjab, as it is there that we find it in its most perfect, as well as in its transitional, forms. It presents three marked phases, which exactly correspond to the changes in an undivided family. The closest form of union is that which is known as the *communal zemindari* village. Under this system 'the land is so held that all the village co-sharers have each their proportionate share in it as common property, without any possession of, or title to, distinct portions of it; and the measure of each proprietor's interest is his share as fixed by the customary law of inheritance. The rents paid by the cultivators are thrown into a common stock, with all other profits from the village lands, and after deduction of the expenses the balance is divided among the proprietors according to their shares.' This corresponds to the undivided family in its purest state. The second stage is called the *pattidari* village. In it the holdings are all in severalty, and each sharer manages his own portion of land. But the extent of the share

**Communal
zemindari
system.**

**Pattidari
system.**

is determined by ancestral right, and is capable of being modified from time to time upon this principle. This corresponds to the state of an undivided family in Bengal. The transitional stage between joint holdings and holdings in severalty is to be found in the system of redistribution, which is still practised in the Pathan communities of Peshawar. According to that practice the holdings were originally allotted to the individual families on the principle of strict equality. But as time introduced inequalities with reference to the numbers settled in each holding, a periodical transfer and redistribution of holdings took place. This practice naturally dies out as the sense of individual property strengthens, and as the habit of dealing with the shares by mortgage and sale is introduced. The share of each family then becomes its own. The third and final stage is known as the *Bhaiachari* village. It agrees with the *Pattidari* form, in as much as each owner holds his share in severalty. But it differs from it, in as much as the extent of the holding is strictly defined by the amount actually held in possession. All reference to ancestral right has disappeared, and no change in the number of the co-sharers can entitle any member to have his share enlarged. His rights have become absolute instead of relative, and have ceased to be measured by any reference to the extent of the whole village, and the numbers of those by whom it is held. This is exactly the state of a family after its members have come to a partition."

**Bhaiachari
system.**

**Relics of
village communities
now in full
force.**

At the present time in India village communities have nearly disappeared, but many of the laws which they brought into existence are yet in full force. The restraints on alienation of coparcenary property under the Mitakshara Law are some of the relics of the olden times and under the British ad-

ministration are destined to continue. In this respect there is a vast difference between the past and the present age. In former times commentators, under the guise of expounding original Institutes which were beyond the reach of the majority of the people, promulgated laws as seemed to them best suited to the changing times. The differences in the laws of the different provinces thus owe their origin to the different customs which had grown in those localities—the commentators simply validating the customs as good law. But under the present administration, such changes with the changeful times seem impracticable.

They seem destined so to continue under British rule.

As the subject of the Joint Hindu Family has already been discussed with great ability and scholarship by Professor Krishna Kamal Bhattacharyya, I shall not attempt to dwell upon it, but shall simply refer you to his book, and for the purposes of my present lecture adopt the conclusions arrived at by him. The Professor, after a collation of all the authorities on the point, says in Lecture III, p. 138. "From all these circumstances taken together, from the indication furnished by Baudhayana's text and from the actual state of things existing at the present day, I conclude that in forming a definite notion of a joint family with regard to its constitution, we may view it as a group of individuals related to one another by their descent from a common ancestor within seven generations in the ascending line." The text of Baudhayana referred to by the Professor in the above quotation runs as follows—"Paternal great-grandfather, paternal grandfather, father himself, brothers of the whole blood, a son born in a wife of the same caste, son's son, and the son of a son's son, all these participators of an undivided *dāya* or heritage,—are spoken of as *sapindas*;—the participators of a divided *dāya* or heritage,

Constitution of the Hindu Joint Family.

are spoken of as sakulyaṣ. Issue of the body existing, it is on them that property devolves. In the absence of a Sapinda, a Sakulya,—and in his absence the preceptor, or the disciple, or the household priest, should take. In absence thereof the king." In the above quotation "the group of individuals related to one another" must be understood as comprising individuals every one of whom is a descendant of the common ancestor in an unbroken male line. Females have always been considered as members of the family to which they are transferred by marriage,¹ but so long as they are unmarried they continue members of their father's family. In the same way, the wives of the male members are taken to be members of the family. So too, sons incorporated into the family by adoption become members of the family. Thus in *Ballabh Das v. Sunder Das* (1877) I.L.R. 1 All. 429 it is said.—"The Joint Hindu family is constituted by the union of descendants by heirship from some common ancestor, and there must be connection among its members by blood, relationship, *adoption*, and marriage (the *italics* are mine)." To the same effect are the decisions in *Sham Kuar v. Gayadin* (1877) I.L.R. 1 All. 255; *Joy Kishore Chowdhry v. Panchoo Baboo* (1879) 4 C.L.R. 538; *Rambhat v. Lakshman Chintaman* (1881) I.L.R. 5 Bom. 630; *Uma Sunker Moitra v. Kali Komul Mozumdar* (1880) I.L.R. 6 Cal. 256; 7. C. L. R. 145 affirmed by the Privy Council* in 1883, I.L.R. 10 Cal. 232; *Surjo Kant Nundi v. Mohesh Chunder Dutt* (1882) I.L.R. 9 Cal. 70; *Mokundo Lall Roy v. Bykant Nath Roy* (1880) I.L.R. 6 Cal. 289; 7 C. L. R. 478.

Affiliation
by adoption.

(1) This would be clear upon a reference to the social customs of the Hindus. The question was also considered by the late Justice Dwarkanath Mitter in *Chundernath Moitra v. Kristo Komul Singh* (1871) 15 W. R. 357.

But though the Mitakshara joint family usually consists of such a large number of male and female members, yet each and every one of them would not be entitled to a share of the family property or to any interest in it on a partition. The family property in the language of jurists is called the coparcenary property. Under the Mitakshara law coparcenary property is that in which the extent of the share of any member is not definite before partition. In Bengal some only of the members of a family governed by the Dayabhaga would own among themselves, even while the family is joint, the entire property in *certain defined shares* and such shares would neither increase nor decrease by subsequent deaths or births in the family. But in the case of a Mitakshara joint family, the case would be otherwise. So long as the family remains joint the coparcenary property may be said to be the property of the whole family, some only of the members being entitled to definite shares in the property on a partition and the others of them simply to maintenance, and no single member having any definite share before partition. Who then are the coparceners? Are they those who can demand a partition, or those who upon a partition would be entitled to share, or those who have a vested interest in the property?

Who are the coparceners.

Shares of coparceners definite in Bengal.

Not so under the Mitakshara till a partition is effected.

Now the members of a family who, upon a partition, would be entitled to shares are not the same as those who have a right to demand a partition, nor those, again, who have a vested interest in the property. If all these three groups had consisted of the same individuals, we might at once conclude that they were the coparceners; but as we shall see presently the groups consist partly of different persons.

I have just said that before a partition of coparcenary property no single member has any definite

share in it. This will appear to be true when we consider that the author of the Mitakshara looks upon partition as one of the sources of property or proprietary right, and that he treats the subject of partition under the head of inheritance.

**Treatment
of the sub-
ject of
partition in
the Mitak-
shara.**

In ch. 1 sec. 1 the author of the Mitakshara discusses two questions simultaneously *viz.*, (1) whether partition is the cause of proprietary right or it merely ascertains the pre-existing right, and (2) whether property *i.e.*, proprietary interest arises by birth or by demise of the previous owner. Dealing with the first question he says (para 7)—“Does property arise from partition? or does partition of pre-existing property take place? Under this (head of discussion) proprietary right is itself necessarily explained; and the question is whether property be deduced from the sacred institutes alone, or from other and temporal proof. Para 8. “(It is alleged) that the inferring of property from the sacred code alone is right, on account of the text of Gautama; ‘An owner is by inheritance, purchase, partition, seizure or finding. &c. &c.’”

**Partition
is the
origin of
property.**

In para 17 the first question in para 7 is resumed. Thus “Next, it is doubted whether property arise from partition or the division be of an existent right.” Para 18 “of these (positions) that of property arising from partition is right; since a man to whom a son is born, is enjoined to maintain a holy fire: for, if property were vested by birth alone, the estate would be common to the son as soon as born: and the father would not be competent to maintain sacrificial fire and perform other religious duties which are accomplished by the use of wealth.” This is the conclusion come to by the commentator on the first of the above questions. The meaning of this conclusion is not that the coparcenary property is not the property

of any definite number of persons, or that the owners collectively are not known before partition ; but that as among the persons, who together represent the body of proprietors, their *several* shares are not known before partition.

I have observed above that all the persons who are entitled to share at a partition are not the same as those who can demand a partition. This would be evident when we consider that at a division of ancestral property by brothers, the mother would be entitled to a share for her life in lieu of maintenance, but under the texts and case-law she would have no right to *demand* a partition. *Sunder Bahu v. Monohur Lal Upadhyaya* (1881) 10 C. L. R. 79, also *Judoo Nath Tewaree v. Bishonath Tewaree* (1868) 9 W. R. 61. Similarly a grandmother who would be entitled to share at a partition among her grandsons would have no right to demand a partition.

All who are entitled to share at partition can not demand partition.

We shall now see that all the persons who acquire a vested interest in the property are not entitled to demand partition. For this purpose we should first see who are the persons who acquire a vested interest in the property. This brings us to the consideration of the second of the questions discussed by Vijnaneswara in chapter I. section I.

Who are the persons who acquire a vested interest.

The author deals with this question thus :—In para 2, he defines “heritage” as wealth which becomes the property of another by reason of relation to the owner. In para 3 he divides heritage into two classes, unobstructed অপ্রতিবন্ধ্য and obstructed সপ্রতিবন্ধ্য and says “The wealth of the father or of the paternal grandfather, becomes the property of his sons or of his grandsons, in right of their being his sons or grandsons : and that is an inheritance not liable to obstruction. But property devolves on parents

Obstructed and unobstructed heritage.

(or uncles,) brothers and the rest, upon the demise of the owner, if there be no male issue : and thus the actual existence of a son and the survival of the owner are impediments to the succession ; and, on their ceasing, the property devolves (on the successor) in right of his being uncle or brother. This is an inheritance subject to obstruction. The same holds good in respect of their sons and other (descendants)."

Great grandson an unobstructed heir though not expressly mentioned as such in the Mitakshara.

The Mitakshara does not mention the great-grandson as one of the unobstructed heirs, but the Viramitrōdaya is clear upon the point. See paragraph 16 ch. II. Part I. p. 72 of Babu Golap Chandra Sastri's English Translation which I have here quoted for easy reference :—

"Katyayana says :—when one himself dies unseparated, his son who has not received maintenance from his grandfather, shall be made participator of the heritage ; he is to get, however, the paternal share from the uncle or the uncle's son ; the very same share shall equitably belong to all the brothers : or his son also shall get : afterwards cessation of succession shall take place." "One himself"—signifies a brother. "His son"—the brother's son. "Maintenance" means share. The question occurring—what sort of share is he to get ? it is said, "the paternal share." "His son" intends the "great-grandson of the person whose" estate is divided—because the case of a grandson is considered." "Afterwards"—that is, "after his son," "Cessation"—that is "cessation" of succession takes place. The meaning is that the great-grandson's son is not entitled to a share. Accordingly, also, Devala says :—'Partition of heritage among undivided parceners and second partition among divided parceners dwelling together, extends to the fourth in descent. This is the settled law—the meaning is that the partition

of heritage extends inclusively to the fourth degree counting from the proprietor."

In paras 21 and 22 of Mitakshara ch. I sec. I the author considers the arguments of his adversaries and in para 27 comes to this conclusion.—“Therefore it is a settled point that property in the paternal (correctly “grandfathers” for the word is *paitamaha*) or ancestral estate is by birth &c.

It follows then that in property inherited as unobstructed heritage by a man from his ancestors, the persons interested simultaneously are, besides himself, his sons and grandsons—all these three generations take vested interest in the property. But are they all entitled to demand partition? No. As regards grandsons; para 3 sec V, ch. I provides—“If the father be alive and separate from the grandfather, or if he have no brothers, a partition of the grandfather's estate with the grandson would not take place; since it has been directed that shares shall be allotted, in right of the father if he be *deceased*; or, admitting partition to take place, it would be made according to the pleasure of the father, like a distribution of his own acquisitions.” The Privy Council also held that a grandson whose father was alive had no right to demand partition. See *Rai Bishen Chand v. Mussamat Asmaida Koer* (1884) I. L. R. 6 All. 560; L. R. 11 I. A 164.

All who take vested interest cannot demand partition.

Grandson cannot demand partition during life-time of his father and grandfather.

The Hindu law recognizes the right of the father to make a partition, and in Mitakshara ch. I sec. V para 3 a similar right is given to the son. “Thus, while the mother is capable of bearing more sons, and the father retains his worldly affections and does not desire partition, a distribution of the grandfather's estate does nevertheless take place by the will of the son.” But there is no text declaring a similar right on behalf of the grandson.

Peculiar
signification
of the word
'Coparcen-
ners' in the
Mitakshara.

We have now seen that the three groups *viz.*, (1) the sharers at a partition, (2) the persons entitled to demand partition, and (3) the persons who acquire a vested interest in the property by birth, are different. But the Mitakshara coparceners are the persons included in the third group, whose shares are not definite before an actual partition. You should note the peculiar signification of the word "coparceners" under the Mitakshara law. It is true that when by collateral succession, more persons than one inherit together, the several heirs should they continue joint would be co-sharers. But such heirs would have their shares definitely known under the law, as they always inherit *per capita*. But the interest of a Mitakshara coparcener extends to the whole, and before an actual division or partition, the extent of his share is unknown.

Adopted
sons.

The practice of incorporating into the family sons by adoption has been in vogue from the ancient times. Adopted sons from the time of their adoption are taken into the family of the adopter. They take, under the Hindu law, the place of sons of the body to all intents and purposes. Their claims are supported by original texts as well as decided cases. The reader is referred to Sastri Golap Chandra Sarkar's Lectures on Adoption under the Hindu Law, p. 403; see also *ante* p. 40.

Sons by
women of
different
tribes.

In former days, a man belonging to any of the three higher castes could marry a woman either of the same caste with him or one of a lower caste. Sons born of such parents could share (though not equally) with legitimate sons at a partition after father's death. But such sons could not demand partition while the father was alive. The text which supports this inference is Mitak. ch. I, sec. VIII, verse 1 which runs thus: "The

adjustment of a distribution among brothers alike in rank, whether made with each other, or with their father, has been propounded in preceding passages. The author now describes partition among brethren dissimilar in class. The sons of a Brahman in the several tribes have four shares, or three, or two, or one &c. &c."

So also in regard to a Sudra's estate the Mitakshara in ch. I. sec. XII. provides that while the father is alive a son begotten by a Sudra on a female slave must depend on his father for his share, though after his death he may inherit the whole or share equally with legitimate sons.

Son begotten by Sudra on female slave.

Such sons, however, would not be the coparceners of the father.

The result, therefore, upon examination of the texts is that the owners of the coparcenary property are the sons (including adopted sons) grandsons and great-grandsons of the last owner.

Sons, grandsons and great-grandsons are coparceners.

The same result was arrived at by West and Nanabhai Haridas J. J. on an examination of all the texts. *Vide* the judgment of the Bombay High Court in *Moro Vishvanath v. Ganesh Vithal* (1873) 10 Bom. H. C. Rep. 444. In that case Haridas J. is reported to have said.* "The rule, which I deduce from the authorities on the subject, is not that a partition cannot be demanded by one more than four degrees removed from the acquirer or *original owner* of the property sought to be divided, but that it cannot be demanded by one more than four degrees removed from the *last owner*, however remote he may be from the original owner thereof" *i.e.*, as I have indicated above the sons, grandsons and great-grandsons of the last owner, or, in other words, confining our attention to the persons in existence, the owner and his sons and grandsons.

* P. 465.

Provided
they are
not dis-
qualified.

But the above enumeration of coparceners would not be complete without our noticing a qualification which the Hindu law lays down. It debars from the coparcenership all those who are blind, lame, or impotent. In a subsequent Lecture on Partition, I shall consider at length who these disqualified persons are. They are expressly excluded from inheritance and partition (*vide* Mit. ch. II, sec. X). The coparceners, therefore, are those sons, grandsons and great-grandsons who are free from the disqualifications.

Summary.

The inferences which arise from the above discussion may be summarised under the following heads.

(1) In certain kinds of ancestral property (as to which we shall see presently) inherited by a man, his sons and grandsons by birth acquire an interest with him—Adopted sons are also his coparceners in such property from the time of their adoption.

• See Mitak. ch. I, sec. I, paras. 23 and 27 and Babu Golap Chandra Sastri's Law of Adoption p. 403.

(2) Grandsons whose fathers are dead represent their (deceased) fathers at a general partition of such property. Mitak. ch. I, sec. V, para. 1.

(3) Grandsons, if their father be alive, have not the right to demand partition but are dependent on their father, Mitak. chap. I sec. V, para. 3.

(4) At any instant of time not more than three generations of male descendants are together entitled to the coparcenary property. This follows as a corollary from Mitak. ch. I, sec. I, paras. 2 and 3.

(5) Though the property may be the joint property of a number of persons consisting of

three generations of male descendants, upon the death of the coparcener of the first generation the property would pass, not as an inheritance but by the principles of survivorship, to the surviving coparceners, and also to such other persons as would, according to the foregoing rules, have by birth a vested interest in the ancestral property. In short, while one generation above will be removed by death, another generation downwards will take its place.

(6) But if in the case above supposed any other member were to die, the coparcenary represented by the survivors would take up the share, so that no third person who was not a coparcener previously would by such event become a coparcener.

(7) The distinction between obstructed and unobstructed heritage is similar to the distinction between the vested interest of an heir-at-law and the contingent interest of an heir presumptive.

Let us now see how the decided cases help us in the above conclusions. A Full Bench of the Calcutta High Court in *Sadabart Prasad Sahu v. Foolbash Koer*, 1869 (3 B. L. R. F. B. 31 or 12 W. R. F. B. 1) laid down that in a joint Mitakshara family consisting of brothers, and their wives, upon the death of one of the brothers without sons, the surviving brothers took by survivorship and not as an inheritance. In *Raja Ram Tewary v. Luchmun Pershad* (1867) 8 W. R. 15, five Judges of the Calcutta High Court held that under the Mitakshara, sons acquired by birth a right with their father in ancestral property. In *Suraj Bansi Koer v. Sheo Persad Sing.* (1879), 1. L. R., 5 Cal. 147; L. R. 6, I. A. 88; 4 C. L. R. 226, the Judicial Committee of the Privy Council held to the same effect. In *Subbayya v. Surayya* (1886), 1. L. R., 10 Mad. 251 the Judges observed.

Cases.

Survivorship.

Right of sons to ancestral property by birth.

Right of grandsons to partition.

The word 'Sons' in Mitakshara does not include 'grandsons.'

What is coparcenary property.

"According to Vignyanesvara Yogi, the author of the Mitakshara, the son's ownership in ancestral estate is not subordinate but co-ordinate and it is dependent only when the father himself acquires the property." In *Sartaj Kuari v. Deoraj Kuari* (1888), I. L. R. 10 All. 272, Sir Richard Couch (p. 284) is reported to have said "The great distinction between the doctrine of the Mitakshara in regard to heritage and that of the Dayabhaga, the law in Bengal, is found in ch. I, sec. I, V. 27 where it is said that property in the paternal or ancestral estate is by birth." The right of a grandson whose father predeceased his grandfather is discussed in *Luchmun Pershad v. Debee Pershad*, (1864) 1 W. R. 317. The judgment of the Full Court of Bombay in *Apaji Narhar v. Ram Chandra Ravji* (1891) reported in I. L. R. 16 Bom. p. 29 enters into a full discussion of the rights of grandsons, whose fathers are alive, to a partition against the will of their grandfather (pp. 40-41) see also *Rai Bishen Chand v. Mussamat Asmaida Koer* (1884), I. L. R. 6, All. 560; L. R. 11, I. A. 164. In the Full Bench decision in *Jogul Kishore v. Shib Sahai* (1883) I. L. R. 5, All. 430, the right of a grandson to enforce partition during the lifetime of his father and grandfather was acknowledged, but the principle of this judgment would seem to be at variance with the Privy Council Judgment in *Bishen Chand's* case above referred to. I ought to tell you here that the term 'sons' does not under the Mitakshara include grandsons as the same word does under the Dayabhaga. See *Suraya Bhukta v. Lakshminarasamma* (1881) I. L. R. 5, Mad. 291.

Let us next consider what is the property which under the Mitakshara law is coparcenary property. We have seen who the coparceners (using the term in its limited sense) are. They

are the father, sons and grandsons who in the coparcenary property have at one and the same time a vested interest. What is that property in which they have such interest? In the language of the Hindu Jurists that property is "the unobstructed heritage." Now the author of the *Mitakshara* defines "heritage" and "unobstructed heritage" in these words:—

"Heritage signifies that wealth which becomes the property of another solely by reason of relation to the owner." It is of two sorts, 'unobstructed' (*apratibandha*) or liable to obstruction (*sapratibandha*). The wealth of the father or of the paternal grandfather becomes the property of his sons or of his grandsons, in right of their being his sons or grandsons: and that is an inheritance not liable to obstruction. But property devolves on parents (or uncles), brothers and the rest upon the demise of the owner, if there be no male issue: and then the actual existence of a son and the survival of the owner are impediments to the succession; and on their ceasing, the property devolves on the successor in right of his being uncle or brother. This is an inheritance subject to obstruction. The same holds good in respect of their sons and other descendants."

This definition makes no distinction between movables and immovables, and therefore, when a man inherits movables or immovables from his father, grandfather or great-grandfather (and when this takes place, it becomes *unobstructed heritage*) the son and grandson of such man become his coparceners. The principal characteristic of a coparcenary property is that it must have been inherited by the man as an unobstructed heritage, *i. e.*, by reason of the inheritor being either a son or grandson or great-grandson to the

Distinguishing features of such property.

previous holder of the property. It is not necessary that during the lifetime of the previous holder of the property, his son, grandson or great-grandson should have a vested interest in the property. It may be the self-acquisition of the previous holder which he was competent to alienate during his lifetime at his pleasure. But if he does not alienate it during his lifetime, and it passes to his sons, grandsons, or great-grandsons by inheritance, it becomes in the hands of such sons, grandsons or great-grandsons an unobstructed heritage *i.e.*, the rights of the sons and grandsons of the heir attach to such property.

Unobstructed heritage or coparcenary property has several distinguishing features. Thus :

(1) The extent of the interest of each coparcener is not known before actual partition. This follows from what we have already seen *viz.*, that partition is the origin of property. In this connection, you should note that Vijnaneswara discusses the law of partition only in connection with coparcenary property, that is, among the father and his sons and grandsons, or among brothers and their descendants and that he discusses the law of inheritance as respects the obstructed heritage.

(2) Coparcenary property is capable of division at the instance of the father or of a son at any moment and of a grandson in certain circumstances.

This incident has also been already considered in the preceding pages.

(3) Any alienation of such property by a coparcener may be questioned by the other coparceners. For, as respects the property, all the coparceners, before actual separation, have equal rights of enjoyment and if any one or more of them without consulting the wishes of the rest

would alienate any portion of the family property, it is only just that the others should be allowed to set the alienation aside by showing the absence of circumstances which alone would justify an alienation.

At the present time, the term 'ancestral property' is used as synonymous with unobstructed heritage, though in its literal acceptance it includes all property coming down from the ancestors, male or female, and either from the direct or collateral ancestors. Thus West and Buhler in their Digest of Hindu Law say: "ancestral property as among the descendants comprises property transmitted in the direct male line from a common ancestor and accretions to such property made with the aid of inherited ancestral estate."

Ancestral property.

The result is that only the property which a man inherits from his father, grandfather or great-grandfather together with the accretions to such property made from out of the income is coparcenary property, *i.e.* property in which the rights of his sons and grandsons attach by birth.

In *Rayadur Nallatambi Chetti v. Rayadur Mukunda Chetti* (1868), 3 Mad. H. C. Rep., p. 455 it was held that a suit by a son against his father to compel a division of immovable property inherited by the latter from his paternal cousin would not lie, as the son would not by birth acquire a right to such property with his father. So also in *Jawahir Singh v. Guyan Singh*, (1868) 3 Agra H. C. Rep., 78 it was held that a son could not control his father's acts in respect to property the succession to which was liable to obstruction, and it was only in respect to property not liable to obstruction that the wealth of the father and grandfather became the property of his sons and grandsons by virtue of birth. Following the above decisions of the Agra and Madras Courts,

Son cannot compel father to partition property inherited collaterally by the latter.

Son cannot control father's acts in respect to such property.

Sir Richard Couch, C.J., in *Nund Coomar Lal v. Ruzceooddeen Hossein* (1872) reported in 18 W. R., p. 477; 10 B. L. R., 183 held that the son could not control his father's acts in respect to obstructed heritage. The same view was adopted in *Jasoda Koer v. Sheo Pershad Singh* (1889), 1. L. R., 17 Cal. 33.

Share of ancestral property received at partition is ancestral property as regards issue.

It has been held in several cases that when ancestral property has been divided among the owners, the share allotted to each of the members is ancestral property in his hands *as regards his own issue*, though it is looked upon as separate property as regards the separated members. On this point see the case of *Muddun Gopal Thakoor v. Ram Buksh Pandey* (1863) 6 W. R., 71, also *Adur Moni Deyi v. Chowdhry Sib Narain Kur* (Mitakshara case) (1877), 1. L. R., 3 Cal. 1, also *Chatturbhoj Meghji v. Dharamsi Naranji* (1884), 1. L. R., 9 Bom., 438.

Property received by son as gift or under will ancestral or not.

It is not always easy to say, whether when a son receives any property from his father under a deed of gift or a will, such property should be considered ancestral (in the limited acceptance of the term) or self-acquired. In the case of *Muddun Gopal Thakoor v. Ram Buksh* already referred to, the Judges held that in the hands of the successor, the property was to be regarded as ancestral.

Test for determining the point.

The correct test for the determination of the question, whether in any individual case the property received by the successor under a will or gift should be looked upon as ancestral or self-acquired, depends upon whether the gift or the devise was valid. If in any particular case the father gives away his self-acquired property which he is competent to give away, the recipient though he would have been the legal heir if no disposition had been made of it by the acquirer would take the property not as heritage but as

self-acquired property. But if the father executes a will in respect of the *whole ancestral property*, in favor of his sons these latter would not take the property under the will, but would receive it as ancestral property in coparcenership with their sons and grandsons.

Property purchased from the profits of ancestral property should like the corpus be looked upon as ancestral property. On this point see the following cases:—Sudanund Mohapattur v. Bonomallee Doss, (1863), 2 Hay, 205; Sudanund Mohapattur v. Soorjoo Monce Dayee (1869), 11 W. R., 436. Jugmohan Das v. Mangal Das (1886), I. L. R., 10 Bom., 528, and Ramanna v. Venkata I. L. R. (1888), I. L. R., 11 Mad., 246. You will see, these cases lay down that not only should the property which was acquired from the profits *after* the birth of a son and coparcener be looked upon as ancestral but also that all property purchased at a time when the father was the absolute owner of the income, *i. e. before* the birth of the son should also be held to be joint family-property. In this connection it should be noted that in Sham Narain Singh v. Rughoobur Dyal (1877), I. L. R., 3 Cal., p. 508; 1 C. L. R., p. 343, Ainslie and Kennedy, JJ., were inclined to think that immovable property purchased with ancestral movables partook of the incidents of ancestral immovable property.

Property purchased from the profits of ancestral property.

Even when the purchase was made before the birth of a son.

Ancestral movables converted into immovables.

To form a clear idea of coparcenary property, let us now consider some descriptions of property which are not coparcenary property though possessed by the members of a joint family.

Instances of properties which are not coparcenary.

(a) One or more members of a joint family may inherit property from collateral ancestors. To such property, their sons and grandsons would have no right by birth, and it would not come under the description of "unobstructed heritage."

Collateral inheritance.

Jasoda Koer *v.* Sheo Pershad Singh (1889), I. L. R., 17 Cal., 33. In the case here supposed if more persons than one succeed jointly to an estate by collateral succession, such members as between or among themselves would be joint owners but by reason of their succeeding *per capita* to defined shares the principles of survivorship would not come into operation on the death of any of them. Jasoda Koer *v.* Sheo Pershad Singh. But when property inherited collaterally is not disposed of by the inheritor or heir and passes by descent, it becomes coparcenary property in the hands of the sons, and *their* sons and grandsons become entitled thereto jointly as if it were "unobstructed heritage," *vide* Ram Narain Singh *v.* Pertum Singh (1873), 20 W. R., 189; 11 B. L. R., 397. Chaturbhooj Meghji *v.* Dharamsi Naranji (1884), I. L. R., 9 Bom. 438. (see p. 450.) In this connection it should be noted that the Privy Council in Muttayan Chetti *v.* Sangili Vira Pandia (1882), I. L. R., 6 Mad. 1; L. R. 9 I.A., 128; 12 C. L. R. 169 held that property inherited from a maternal grandfather may not be self-acquired property and doubted if it was not ancestral property. The above case was discussed in Jasoda Koer *v.* Sheo Pershad Singh (1889), I. L. R., 17 Cal., 33.

Separate acquisition without use of ancestral property.

(b) One or more members of a joint family may acquire property by their own exertions. Such property movable or immovable would not be the coparcenary property of the family. In the earliest times, *i. e.*, in the days of the patriarchal family, the acquisitions fell into the common stock: Manu ch. VIII. sloka 416 says "Three persons, a wife, a son and a slave are declared by law to have in general no wealth exclusively their own; the wealth which they may earn is regularly acquired for the man to whom they

belong." To the same effect is the text of Narada (ch. V. para. 59) who says, "of a son, he is of age and independent in case his parents be dead: during their lifetime he is dependent even though he be grown old." Upon the decline of the Patriarchal, and the rise of the joint, family consisting generally of brothers, the authority of the eldest became limited and the inconvenience of the above rule of Manu was perceived. No individual member had any particular incentive to exert, so long as he was not sure that the fruits of his exertions would be exclusively his. Rules were therefore made for allowing acquisitions to belong to the persons to whose exertions they were due, and accordingly we find Manu, when speaking of joint family of later days consisting of brothers and other descendants in ch. IX. slokas 206-209 says—"what a brother has acquired by labor or skill without using the patrimony, he shall not give up without his assent, for it was gained by his own exertion." The author of the Mitakshara in ch. I. sec. IV in discussing what effects are not liable to partition quotes verses 118 and 119 of Book. II. of Yajnavalkya. They are :--

118. "Whatever else is acquired by the coparcener himself without detriment to the father's estate, as a present from a friend or a gift at nuptials, does not appertain to the co-heirs.

119. "Nor shall he, who recovers hereditary property, which had been taken away, give it up to the parçeners: nor what has been gained by science."

The author then adds that the qualifying words "without detriment to the father's estate must be applied to each one of the acquisitions enumerated

in the verses. (See ch. I. sec. IV. para 6). The conclusions arrived at are given in paras. 29-31.*

While on this subject, let me draw your attention to the interpolation made by the author of the Mitakshara of the words "or mother's" between the words "father's" and "estate" in the passage quoted from Yajnavalkya. The result is that property acquired with money from the paternal or maternal estate is not looked upon as self-acquired property.

What
amounts to
spending
of patri-
mony.

What would amount to an expenditure of partimony so as to make the acquisition ancestral property was considered in *Purtab Bahadur Tilukdharee* 1807, *Select Reports* Vol. I. p. 236 and the principles there laid down were that "of several brothers living together in family partnership, should one acquire property by means of funds common to the whole, the property so acquired belongs jointly to all the brothers. Should, however, the means of acquisition, drawn from the joint funds, be of little consideration, and the personal exertions considerable, two shares belong to the acquirer, and one to each of the other brothers." The above principles were also laid down in *Sree Narain Berah v. Gooro Pershad Berah* (1865) 6 W. R. 219 and *Sheo Dyal Tewaree v. Bisho Nath Tewaree* (1868) 9 W. R. 61.

Marriage
presents

(c) Nuptial presents which are made to the bridegroom belong to the bridegroom, notwithstanding that he may be a member of a joint

* 29. It is settled, that whatever is acquired at the charge of the patrimony is subject to partition. But the acquirer shall, in such a case, have a double share, by the text of Vasishtha. 'He among them, who has made an acquisition, may take a double portion of it.'

30. The author propounds an exception to that maxim. 'But if the common stock be improved an equal division is ordained.'

31. Among unseparated brethren, if the common stock be improved or augmented by any one of them, through agriculture, commerce or similar means, an equal distribution nevertheless takes place: and a double share is not allotted to the acquirer.

family. The only condition is that the presents must be obtained without causing any detriment to the ancestral wealth *i. e.*, ancestral money must not be spent in order to secure such presents. Yajnavalkya's text and Vijnaneswara's comments thereon have already been quoted when dealing with the subject of acquisitions of labor without the spending of joint money. In *Beharee Lal Roy v. Lall Chand Roy* (1876) 25 W. R. 307 Macpherson J, upon a consideration of the texts of Hindu Law, held that when one of two brothers, who inherited no property from their father, obtained valuable presents by marriage, the other was not entitled to a share of the same though he lived with his brother as member of a joint family. Here from the nature of things, there was no detriment to ancestral or joint property of the family, and consequently the presents by virtue of the texts we have just considered became the exclusive property of the brother who acquired them.

It has been held that in modern times most of the marriages take place in the Brahma form in which the bridegroom has not to pay anything to the bride's father. *Judoonath Sirkar v. Busunt Coomar Roy Chowdhury* (1871) 16 W. R. 105. But though the bride's father receives no money in cash, both parties,—the bridegroom's as well as the bride's—have to spend large sums in the exchange of gifts. Marriage presents obtained under such circumstances should be looked upon as divisible.

(d) When a member of an undivided family without spending any money belonging to the joint family recovers any ancestral property, he acquires it for himself, and his coparceners in the family-property are not entitled to any shares therein.' This rule of law is based on Yajnavalkya's text, Book II

Ancestral property recovered without help of joint family property.

verse 119 already quoted. † It should be remembered that the qualification "without detriment to the father's estate" mentioned in verse 118, applies, according to Vijñaneswara to verse 119 also.

Vijñaneswara in ch. I., sec. 5 para 11 quotes Manu ch. 9 sloka 209 which runs as follows: "If the father recover paternal wealth not recovered by his co-heirs, he shall not, unless willing, share it with his sons; for, in fact, it was acquired by him." He also quotes with approbation in ch. I. sec. IV, para. 3, a text of Sankha which runs in these words "Land inherited in regular succession, but which had been formerly lost and which a single heir shall recover solely by his own labor, the rest may divide according to their due allotments having first given him a fourth part." These texts which at first sight seem contradictory, may be reconciled by making the former applicable to the only case of the *father* recovering the lost property and by making the latter apply to all other cases.

But it is not every recovery of ancestral property that would entitle the recoverer to treat the property as self-acquired. The texts as well as the reported cases lay down the restrictions.

Reported
cases on the
point.

In Visalatchi Ammal v. Annasamy Sastry (1870) 5 Mad. H. C. Reports, p. 150, Scotland, C. J., in reference to a contention made before him that property redeemed by a member should be held to be the self-acquired property of the member, said, "We are of opinion that the rule of law thus propounded is inapplicable to the present case. In the first place, we are not prepared to hold that the rule extends to property held by a title derived from the joint family. The language both of the texts and the commentaries seems to us at present to indicate that the rule was intended to apply to hereditary property of which the members of the

family had been violently or wrongfully dispossessed or adversely kept out of possession for a length of time. * * * But supposing this construction not to be correct, we rest our opinion on the ground that the recovery to be within the ordinance should appear to have been undertaken when the neglect of the coparceners to assert their title had been such as to shew that they had no intention to seek to recover the property, or were at least indifferent as to its recovery and thus tacitly assented to the recoverer using his exertions and means for that purpose." To the same effect are the observations of Macpherson, J., in *Bissessur Chackerbutty v. Seetul Chunder Chackerbutty* (1868), 9 W. R., 69 and of Markby, J. in *Bolakee Sahoo v. Court of Wards* (1870), 14 W. R., 34 and of Sir Charles Turner, C.J., in *Naraganti Achammagaru v. Venkata Chalapati* (1880), 1. L. R., 4 Mad. p. 250 (see page 259).

When the recovery is due to the spending of ancestral funds, the acquisition is classed as ancestral property (*vide* the case of *Jugmohan Das v. Mungul Das*, 1. L. R., 10 Bom. 528 already referred to).

(e) Gains of science made by any individual member of a joint family without detriment to the ancestral estate belong to the acquirer as his exclusive property and are not liable to partition. This rule of law is also founded on the text of Yajnavalkya quoted from Book II verse 1.19. You should read this in connection with para 6 sec. IV ch. I. The words there used are "what is gained by science *without use of father's goods*."

Gains of
science.

In para 8 Vijnaneswara quotes in this connection a passage of Narada which runs in the following words "He who maintains the family of a brother studying science, shall take, be

he ever so ignorant, a share of the wealth gained by science." So again in para. 13 he quotes Manu chap. 9 sloka 204. "After the death of the father if the eldest brother acquire any wealth, a share of that belongs to the younger brothers provided they have duly cultivated science." It seems that the duty, enjoined on the brother studying science to share his acquisitions with his brothers who took care of the family during his absence at his teacher's, is founded on principles of equity and natural justice, and that the rule of law which provides for the eldest brother sharing his acquisitions from all sources with his learned brother was provided only for the encouragement of learning. The student will do well to read on this point the Lectures delivered by Professor K. K. Bhattacharyya, pp. 661—667.

Reported
cases on the
point.

This mode of separate acquisition of property by a member of an undivided family has been considered in several reported cases. Their Lordships of the Privy Council in *Pauliem Valoo Chetty v. Pauliem Sooryah Chetty* (1877), I. L. R. 1 Mad. p. 252; L.R., 4 I.A. p. 109, doubted the correctness of the very wide proposition of law therein contended for. Sir Robert Collier in delivering the judgment of the Committee, said "This being their Lordships' view it does not become necessary to consider whether the somewhat startling proposition of law put forward by the appellant—which, stated in plain terms, amounts to this: that if a member of a joint Hindu family receives any education whatever from the joint funds, he becomes for ever after incapable of acquiring by his own skill and industry any separate property,—is or is not maintainable. Very strong and clear authority would be required to support such a proposition." His Lordship was inclined to adopt the more

moderate view of the law laid down by Jackson and Mitter, JJ. in *Dhunookdharee Lall v. Gunput Lall* (1868), 10 W.R., 122; 11 B. L. R., 201 note. This point was subsequently considered in 1882 in *Lakshman Mayaram v. Jamnabai* (1882), 1. L. R., 6 Bom. p. 225. The judges held that the education intended by the texts was the special training for a particular profession which is the immediate source of the gains and "not the elementary education which is the necessary stepping stone to the acquisition of all science." This case was followed in *Krishnaji Mahadev v. Moro Mahadev* (1890), 1. L. R., 15 Bom. p. 32. The other cases to which reference may be advantageously made are *Bai Manchha v. Narotam Das*, (1869) 6 Bom. H. C. Rep. A. C., 1, *Durvasula Gangadharudu v. Durvasula Narasammah* (1872), 7 Mad. H. C. R., 47, and *Boologam v. Swornam* (1880), 1. L. R., 4 Mad. 330.

(f) It not unfrequently happens that grants of estates or Jagirs are made by Government in their sovereign right to individual members of undivided families in recognition of their public services. Such grants are in the nature of rewards and if the consideration for which they may have been granted be not traceable to any expenditure of the funds of the family, the property would be self-acquired as contradistinguished from ancestral within the meaning of the verse 118 Book II of *Yajnavalkya* already quoted. On this point see the case of *Kattaina Natchiar v. the Rajah of Shivagunga*, 9 M. I. A., p. 539; 2 W. R. P. C. 31. But if the grant be only a confirmation in the name of one member of a joint family, of a grant which originally belonged to the family, it cannot be looked upon as a separate acquisition by the individual member. On this point the case of *Beerpertab Sahee v. Rajender Pertab Sahee*

**Grants from
Sovereign.**

(1868) commonly known as the Hunsapore case reported in 12 M. L. A. p. 1 ; 9 W. R., P. C. 15 may be referred to. But this is a question of evidence and of construction of grants and is not peculiar to the law of joint property.

Savings
made by
proprietor
for time
being of
impartible
estate.

(g) We have seen that in a joint family, acquisitions or purchases made from out of the income of the joint family are looked upon in the same light as the corpus or the source. This is true and just when the income is the joint property of the members. In such a case the savings made also become part of the joint property. But the case is different when although the property is the common property of the family, the income is at the absolute disposal of any single member of the joint family. And this is exactly the case with the savings made from out of the income of an impartible estate. We shall in a subsequent lecture see that estates which, under the custom of the family or the terms of the grants whereby they were created, are impartible, are not to be looked upon as necessarily the self-acquired property of their owners for the time being *i. e.*, as if they cannot be the joint property of the family. In fact in the Mitakshara territory, estates impartible in their nature and yet the joint property of the family are very common. As to such estates, the owners for the time being have the absolute disposal of the income and any savings made by them are therefore looked upon as their separate property. Such property if left undisposed of by the holder would be partible among the heirs.*

We have up to this time seen that a Mitakshara joint family generally consists of a large number of persons—males and females—but of

* Rajeswara Gajapati Naraina Deo v. Virapratapah Rudra Gajapaty Naraina Deo (1869) 5 Mad. H. C. R. p. 31. See, p. 41.

them, only some males are the owners of the joint property of the family. We shall now see that of the rest, some of the males and females are entitled to maintenance from out of the joint property. The subject of maintenance generally does not form a part of my subject. I shall not therefore discuss here whether a Mitakshara father inheriting no ancestral property from *his* father is under any legal or moral obligation to maintain an adult son, or whether a father-in-law under similar circumstances is bound to support a widowed daughter-in-law. These and similar questions are parts of the general subject of "Maintenance under the Hindu Law." What I have to consider is who are the members of the joint family, who by reason of the family being possessed of joint property are entitled to maintenance, and whether as regards those persons, their maintenance would be a charge on the joint property, and if so, under what circumstances. If a son or a wife has a moral claim to support from his father or her husband, such claim stands upon its own merits.

Members of joint family entitled to maintenance.

General question of maintenance is not subject of consideration.

Properly speaking the subject of maintenance ought to be treated after that of partition; for so long as the family is joint, all persons in the family, whether they be coparceners or merely entitled to maintenance, do receive maintenance on the same scale. But I prefer treating the subject here, in as much as even before an actual partition of ancestral property among the coparceners, females who would be merely entitled to maintenance at a partition do sometimes find it necessary to seek the help of courts in order to be able to support themselves. In several instances the profits of a portion of the joint property are assigned to a widow for her maintenance, and such portion upon her death reverts to the family. In other cases a monthly allowance in cash is determined upon and

Maintenance, connected with partition.

provided for. But in either class of cases the family-property remains joint as regards the other members, and the allotment of a portion of the family-property for purposes of maintenance of some members does not affect the undivided status of the family.

In a subsequent Lecture we shall see that at a general partition, property sufficient to meet the demands for maintenance of those entitled to it is frequently set apart and the rest divided among the coparceners. The portion set apart remains the joint property of the coparceners and is divided among them or their heirs after the liability for maintenance has ceased.

In considering the subject of maintenance let us first examine the Rishi texts on the point.

VISHNU XV. (DR. JOLLY).

"32. Outcasts, eunuchs, persons incurably diseased or deficient in organs of sense or action; such as blind, deaf, dumb or insane persons or lepers do not receive a share.

"33. They should be maintained by those who take the inheritance.

"34. And their legitimate sons receive a share.

"35. But not the children of an outcast.

"36. Provided they were born after the commission of the act on account of which the parents were outcasted.

"37. Neither do children begotten by husband of an inferior caste on women of a higher caste receive a share.

"38. Their sons do not even receive a share of the wealth of their paternal grandfather.

"39. They should be supported by the heirs.

VASISHTHA XVII. (DR. BUHLER).

"53. Eunuchs and mad men have a claim to maintenance."

**Texts as to
who are
entitled to
mainten-
ance**

BAUDHIYANA PRASUN 11. ADHIYAYA 2.
KANDIKA 3.

"37. Granting food, clothes and shelter they shall support those who are incapable of transacting legal business.

"38. (*viz.*), the blind, idiots, those immersed in vice, the incurably diseased and so forth.

"39. Those who neglect their duties and occupations.

"40. But not the outcast nor his offspring.

"42. But he shall support an outcast mother without speaking to her.

NARADA XIII.

"24. Persons afflicted with a chronic or acute disease or idiotic or mad or blind or lame (are also incapable of inheriting). They shall be maintained by the family, but their sons shall receive their respective shares of the inheritance.

"26. They shall make provision for his (deceased brothers') women till they die, in case they remain faithful to the bed of their husband. Should the women not remain chaste, they must cut off that allowance.

"27. If he has left a daughter her father's share is destined for her maintenance. They shall maintain her up to the time of her marriage; afterwards let her husband keep her.

BRIHASPATI XXV.

"54. A wife though preserving her character and though partition have been made is unworthy to obtain immoveable property. Food or a portion of the arable land shall be given to her at will for her support." Dr. Jolly.

All these texts appear under the heading "Inheritance," and from the context they evidently refer to a partition of the joint property. The

conclusion I draw from these texts is that where there is joint ancestral property, all the members enumerated in the texts must be supported. By this I do not mean to suggest that where there is no ancestral property, none can claim support. A man may have the moral and legal duty of supporting a number of persons even though he may not be possessed of ancestral property. Thus Manu, Book 3, sloka 406. says. "A mother and a father in their old age, a virtuous wife and an infant son must be maintained even though doing an hundred times that which ought not to be done." This text seems to prescribe a moral and a legal duty for every man whether he be possessed of any ancestral property or not.

Vijnaneswara is silent on the question of maintenance. There are only three verses of Yajnavalkya which have any bearing on this subject. Two of these are:—Book II, verse 123a "Of heirs dividing after the death of the father, let the mother also take an equal share. 143. And their childless wives conducting themselves aright must be supported; but such as are unchaste should be expelled and so indeed should those who are perverse."

The first of the above two verses is quoted by Vijnaneswara in discussing who are entitled to shares at a partition and the second in discussing the question of inheritance to one who leaves no nearer heirs. In treating of the exclusion of certain persons from inheritance, Vijnaneswara quotes the third verse from Book I. It is V. 140 which runs in these words "An impotent person, an outcast and his issue, one lame, a mad man, an idiot, a blind man and a person afflicted with an incurable disease as well as others similarly disqualified must be maintained, excluding them, however, from participation." These are all the texts on the point.

While on the subject of maintenance as incidental to the possession of joint property it would not be out of place to mention that under the Hindu Law one who inherits the property of another is under a legal obligation to discharge even the merely moral duties of the latter. Thus if it is the moral duty of a man to support his widowed daughter-in-law, it would be a legal duty of his son to support his own widowed sister-in-law. The heir holds the property for the benefit of his ancestor. So although a father-in-law could not be compelled to support his widowed daughter-in-law, still upon his death, the inheritor of his property—say his son,—the brother-in-law would be bound to provide her with maintenance.

Rights of daughter-in-law and sister-in-law.

Let us now attempt to use the texts we have quoted in connection with the owners of a coparcenary property.

• It is clear that so long as the family is joint and is in the enjoyment of joint property the coparceners—and who they are we already know—are entitled to be maintained. It is *their* property. It also follows that other persons who *would have a moral and legal claim* upon the coparceners for maintenance should also be supported from out of the joint property. Now the persons who without reference to property would have a claim upon another to maintenance are his infant sons, his unmarried daughters, his wife and his parents. Some of these persons may, by reason of their being his coparceners, be entitled to maintenance as of right. The texts of Manu already quoted* establish the right of minor sons, wife and parents. As to daughters their right has to be inferred from Mitak. ch. I, s. VII, para. 5, which provides a share for her at partition.

Coparceners.

Persons entitled to maintenance without reference to ancestral property.

Members expressly excluded from inheritance.

Besides the two classes of persons above enumerated *viz.*, the coparceners and their dependants, there may be a third class of persons who without being coparceners would be entitled to maintenance. These are the persons who are expressly excluded from inheritance, the blind, the lame, the impotent, the outcast and the lepers. These persons would not be coparceners in the joint property and their shares upon a partition would go to increase the shares of the coparceners. The ancient Rishis therefore thought it fair and just that these latter should support the disqualified members and their wives. For similar reasons the widow and unmarried daughter of a deceased undivided brother and a widowed daughter-in-law would be entitled to maintenance; for, though it is true that the deceased brother or the son had in the absence of a partition no property and his interest in the joint property lapsed upon his death to the survivors, not as assets left by the deceased but by the principles of survivorship, yet as the brother and the son might by partition, during their lives make provision for their* wives, the law allows them maintenance from the joint property.

Widow and unmarried daughter of a deceased undivided brother and widowed daughter-in-law.

Unmarried sister

The right of the unmarried sister to maintenance would follow from the consideration that she is the daughter of the previous owner and coparcener who was bound to support her. There is, besides, the text of Yajnavalkya:—"But sisters should be disposed of in marriage giving them as an allotment the fourth part of a brother's own share."† Her right to maintenance has therefore to be inferred.

* *Dēvi Persad v. Gunwanti Koor* (1895), 1 L. R., 22 Cal. 410

† Book II. v. 124a.

Let us now examine the decided cases. In *Savitri Bai v. Luximi Bai* (1878), I. L. R., 2 Bom. 573, a Full Bench of the Bombay High Court upon a consideration of the ancient Smritis and the commentaries on them, and also of the cases on the question of maintenance decided in the several High Courts and of the practice in the Bombay Presidency, came to the conclusion, that a claim for maintenance by a Hindu widow against the uncle of her deceased husband—his nearest surviving male relative,—was unsustainable where the defendant was separate in estate from the plaintiff's husband at the time of his death, or where at the institution of the suit the defendant had not in his hands any ancestral estate or any estate which had belonged to the plaintiff's husband. The learned judges on p. 597 speaking of the texts say:—"We have no need, in this case, to decide positively upon the right to maintenances under such circumstances as we have here, of a wife against her husband, or of a mother against her son. It is, however, incumbent upon us to notice in the language of Manu and other Hindu jurists, an important distinction when without reference to the existence of family-property they especially treat of the maintenance and support of the wife or of parents or of an infant son, and when they speak of the maintenance and support of the females of the family at large. In the former case their tone is mandatory, in the latter only preceptive."

Reported cases on the subject of maintenance.

The above decision was followed by a second Full Bench of the Bombay High Court in *Apaji Chintaman Devdhar v. Ganga Bai* (1878), I. L. R., 2 Bom. p. 632. Here the claim of a brother's widow for maintenance was disallowed because the defendant did not hold any ancestral property or receive any property from the plaintiff's husband.

In *Madhav Rav v. Ganga Bai* (1878) I. L. R.,

2 Bom. 639, the Court went to the length of holding that the amount of maintenance was limited to the extent of the income of the property received by the defendants from the plaintiff's husband or in respect of which the plaintiff's husband had a claim.

In *Kalu v. Kasbi Bai* (1882) 1. L. R., 7 Bom. 127; *Bai Kanku v. Bai Jadav* (1883) 1. L. R., 8 Bom. 15; and *Bai Daya v. Natha Govind Lal* (1885) 1. L. R., 9 Bom. 279, claims for maintenance were disallowed on the ground that the defendants held no joint property.

In *Adhibai v. Cursandas Nathu* (1886) 1. L. R., 11 Bom. 199, the claim of a widow for maintenance was allowed against her late husband's brother—her husband having died during the lifetime of his father, who was possessed of only self-acquired property and who died intestate leaving the defendant his sole surviving son. Justice Farran held that the father having died intestate, the property when inherited by the son became ancestral property in his hands according to the principles of Hindu law and the son by reason of his holding ancestral property was bound to maintain his sister-in-law who was a member of the joint family. According to the decisions in 1. L. R., 2 Bombay Series already referred to and *Lalti Kuar v. Ganga Bishun*, 7 N. W. P. Rep. p. 261, a further ground on which the claims of widows to maintenance were sometimes allowed seems to have been the idea that their husbands died possessed of some property which by reason of their widows' incapacity to inherit was received by the persons against whom the claims were pressed. But in the case before Justice Farran, the property having been the self-acquired property of the father-in-law, during his lifetime the plaintiff's husband had no interest in it and the claim for maintenance

therefore could not have been based on this ground. The learned judge allowed the claim by the application of the principle, that as it was a moral duty of the father-in-law to support his daughter-in-law, the brother-in-law, who inherited the father-in-law's property, became legally bound to discharge the moral obligation of the father-in-law.

Moral obligation of a person becomes a legal obligation of his son when he inherits paternal property.

The view here suggested was expressed by a Full Bench of the Allahabad High Court in *Janki v. Nandram* (1888) I. L. R., 11 All. p. 194, followed by Justice Banerji in the Calcutta High Court in *Kamini Dossee v. Chandra Pote Mondle* (1889) I. L. R., 17 Cal. 373. In *Amma Kannu v. Appu* (1887) I. L. R., 11 Mad. 91, it was held that possession of ancestral property by a father-in-law was a condition precedent to maintenance being granted to the daughter-in-law, and that only aged parents, wife and minor children had a valid claim to maintenance against any man irrespective of any ancestral property. See also *Subbarayana v. Subbakka*, I. L. R., 8 Mad. 236.

I am afraid I have been digressing from my main subject. There is, it is true, a conflict of opinions as to whether, when a man is not possessed of ancestral property, he is bound legally to support his widowed daughter-in-law or sister-in-law. See the cases already cited and *Khetra Moni Dasi v. Kashinath Das* (1868) 2 B.L.R., A.C. p. 15; 10 W.R., F.B. 89. An examination of these decisions is not necessary for the purpose of these Lectures. But all the authorities agree in thinking that when a person possesses ancestral property, in which another, but for some legal disqualification, would have been entitled to an interest, either directly or through a third person who was under a legal and moral obligation to support such person, the latter would have a valid claim to maintenance against the person holding the ancestral property.

Adult sons, only when they are coparceners.

You will have noticed from the texts, already quoted, that adult sons unless they are coparceners cannot have any claim on their fathers for maintenance. This point was decided in a Dayabhaga case, *Premchand Peparah v. Hulas Chand Peparah* (1869) reported in 4 B.L.R. App. 23; 12 W.R. 494 and the decision was cited with approbation by Pinhey J., in *Ram Chandra Sakham v. Sakham Gopal Vagh* (1877) I. L. R., 2 Bom. p. 346 (see p. 350). On this point you may refer also to the case of *Nilmoney Singh Deo v. Baneshur* (1878) I. L. R., 4 Cal. p. 91.

Sons by concubines.

The texts provide for maintenance of sons by concubines.* The case of *Muttu Samy Jaga Vira Yettapa Naikar v. Venkata Subba Yettia* (1865) reported in 2 Mad. H.C. Rep. p. 293, and *Coomara Yettapa Naikar v. Venkateswara Yettia* (1870) 5 Mad. H. C. Rep. 405 may be cited in support.

Unchastity forfeits maintenance.

Before I conclude this branch of my subject, I ought to point out to you that unchastity, according to the text† and all reported cases, disentitles a woman to all claims to maintenance. See the decisions in the following cases—*Valu v. Ganga* (1884) I. L. R., 7 Bom. 84; *Vishnu Shambhog v. Manjamma* (1887) I. L. R., 9 Bom. 108; *Yashvantrav v. Kashi Bai* (1887) I. L. R., 12 Bom. 26; *Romanath v. Rajonimoni Dasi* (1890) I. L. R., 17 Cal. 674; *Daulta Kumari v. Meghu Tewari* (1893) I. L. R., 15 All. 382; *Nagamma v. Virabhadra* (1894) I. L. R., 17 Mad. 392.

Charge for maintenance.

Let us next consider whether maintenance, whenever there is a legal liability for it, is a charge on any property in the hands of the persons liable to pay such maintenance. I exclude, of course, the coparceners who have a right to be maintained

* Mit. ch. I sec. XII. provides for shares and indirectly for maintenance.

† Narada 13, 25-26 quoted in Mitakshara ch. II. sec. 1 para. 7.

from their own property. The question raised may be considered in two parts: (1) whether the person entitled to maintenance can at any time seek for a declaration of his or her lien for maintenance on any property in the hands of the person liable to pay such maintenance, and (2) whether, when the maintenance is payable, only because of the possession of any ancestral property, the person entitled to maintenance can follow such property in the hands of third persons who may derive their title by purchase, gift or devise from the person originally liable to pay the maintenance. As to the first part of the question: when the liability to pay the maintenance is based upon the possession of ancestral property, it is manifest that the maintenance can be charged on the ancestral property while it continues in the possession of the person liable to pay the maintenance.* In other words, it would be open to the person entitled to the maintenance to have his or her lien on the property, either declared by decree of court, or provided for in a private agreement. In such a case when once the lien has been formally created, any transfer of the property charged with such lien would be subject to the lien *i. e.*, the transferee would be bound to discharge it. But before such lien is actually declared the property would not be subject to any charge. *Bhagirathi v. Anantha Charia* (1893) I. L. R. 17 Mad. 268. The other cases where the liability to maintain is a moral and legal obligation wholly irrespective of the possession of any property, we need not consider. The person entitled to the maintenance may, when a cause of action should arise, obtain a decree declaring his or her

When claim based on possession of ancestral property.

When not so based.

* *Mahalakshamma Garu v. Venkataratnamma Garu* (1882) I. L. R. 6 Mad. 83; *Muttia v. Virammal* (1886) I. L. R. 10 Mad. 283; *Kalpaga-thachi v. Ganapathi Pillai* (1881) I. L. R. 3 Mad. 184; *Sham Lal v. Banna* (1882) I. L. R. 4 All. 296; *Masha Devi v. Jiwan Mal* (1884) I. L. R. 6 All. 617.

Can such property be followed in hands of third persons.

When a specific charge has been created.
when not.

Case of gifts.

lien on any property which the person liable to pay the maintenance may be possessed of. Let us now discuss the second part of the question *vis.*, whether, when the liability to pay the maintenance is based on the possession of any ancestral property, such property can be followed in the hands of the third persons, who may have acquired a right to the same by gift, devise or purchase from the person liable to pay the maintenance. It goes without saying that when a specific charge has been created either by agreement between parties or by a decree of Court, the transferee takes the property subject to the charge. But what we have now to consider is, whether when no specific charge has been so created, the law would imply a charge.

Let us first consider whether properties can be followed in the hands of donees. On the subject of gifts, Brihaspati says. XV. 2. "That which may not be given is declared to be of eight sorts, joint property, a son, a wife, a pledge, one's entire wealth, a deposit, what has been borrowed for use, and what has been promised to another."

The above precept has been amplified in the succeeding paragraphs 3-7, Vide Professor Jolly's Translations edited by Dr. Max Müller in his "Sacred Books of the East, Vol. XXXIII part I p. 342). There are similar texts of Katyayana and Vyasa quoted by Mr. Mayne in his work on Hindu Law and Usage. Narada in Book IV, para. 4, prohibits the gift of the whole property of one who has offspring (Vide the Translations above referred to p. 128).

On this point you may refer to the judgment of Mr. Justice West in *Narbada Bai v. Mahadeo Narayan* (1880) I. L. R., 5 Bom. p. 99. That learned judge held that, under the Mitakshara law, a Hindu husband could not give away the whole of his self-acquired immovable property to the

destitution of his wife. But the High Court of Calcutta in a case governed by the Dayabhaga (Debendra Coomar Roy Chowdhry v. Brojendra Coomar Roy Chowdhry (1890) I. L. R., 17 Cal. 886) held that a person had the right to dispose of his property by will so as to deprive his widow of her share on partition. You must remember that we are not now considering the question of the validity of gifts made by an undivided member of a joint family. Here we are considering whether gifts of entire property made by all the persons entitled to the coparcenary are valid as against the claims of persons entitled to maintenance. If such gifts are made gratuitously or with the purpose of depriving a person of his maintenance, then under the Transfer of Property Act IV of 1882 sec. 39, or where that Act does not apply under the general law, such person may enforce his right to maintenance against the property in the hands of the donee. The same consideration would apply to devises of entire property.

Case of
devise.

Sales stand on a different footing. They may often be necessary for the payment of debts, the non-payment of which would consign the debtors to hell. Purchasers may purchase in good faith and for proper price from which the claimant himself for maintenance may derive some advantage, and if the sales are set aside they may not get back their purchase-money. But the conflicting equities which arise in the case of sales have no place in the case of voluntary gifts. On this point sec. 39 of Transfer of Property Act* and the

Case of
sale.

* "Where a third person has a right to receive maintenance, or a provision for advancement or marriage, from the profits of immovable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention or if the transfer is gratuitous; but not against a transferee for consideration and without notice of the right, nor against such property in his hand."

following decisions may be referred to:—*Bhagabati Dasi v. Kanai Lall Mitter* (1871), 8 B. L. R., 225; 17 W. R., 433 note; *Adhirani Narain Kumari v. Shonamalee* (1878) I. L. R., 1 Cal. 365; *Laksman Ram Chandra Joshi v. Satyabhamma Bai* (1877) I. L. R., 2 Bom. 494, where it was held that even if the purchaser had notice of the claim for maintenance, he would not be liable to meet the claim. *Shamlal v. Banna* (1882) I. L. R., 4 All. p. 296, *Kalpagathachi v. Ganapathi Pillai* (1881) I. L. R., 3 Mad. 184.

When portion of property remains in the family, purchaser cannot be followed.

Before leaving this part of the subject I ought to tell you that under the reported cases, so long as the person liable to pay the maintenance is in possession of a portion of the ancestral property sufficient to defray the maintenance expenses thereout, the property in the hands of a purchaser cannot be followed; *vide* the case of *Adhiranee Narain Coomary v. Shonamalee* (1876) I. L. R., 1 Cal. 365, already referred to. Nor can a female, who would be entitled to a share in lieu of maintenance at a partition, be entitled to claim such share except when the joint estate ceases to be so. See the case of *Barahi Debi v. Deb Kamini Debi* (1892) I. L. R., 20 Cal. 682.

Family dwelling house.

With regard to the family dwelling house, the Transfer* of Property Act sec. 44, para. 2 provides "where the transferee of a share of a dwelling house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house." This is as vague as any thing can possibly be. It leaves untouched all the rights of the purchaser as are independent of the Act or rather of the section of the Act.

* The Act has no application to Bombay, Burma or the Punjab.

We are now in a position to picture to ourselves a joint Hindu family governed by the Mitakshara Law. It may be compared with corporations. Thus Sir Henry Maine in his work on Ancient Law says :—"Succession in corporation is necessarily universal and the family was a corporation. Corporations never die. The decease of individual members makes no difference to the collective existence of the aggregate body, and does not in any way affect its legal incidents, its faculties or liabilities."

Joint family compared with corporation.

Mr. Justice Markby in *Rangan Mani Dasi v. Kasinath Dutt* (3 B. L. R., O. C. p. 1; 13 W. R., 76 note) contrasted a joint-family with a partnership concern. He said "There is no analogy whatever, in this respect between the members of a joint Hindu family and the members of a partnership; each partner is the agent of the other, bound, by his contract, to protect and further the interests of his copartners unless relieved from that responsibility by special arrangement; and each partner is entitled to consume on his own account, no more of the partnership property than the share of the profits."

Contrasted with partnership concern.

"If he exceeds this, he becomes immediately a debtor to the concern. But in a Hindu family, it is wholly different. No obligation exists on any one member to stir a finger, if he does not feel so disposed, either for his own benefit or for that of the family; if he does do so, he incurs no responsibility; nor is any member restricted to the amount of the share which he is to enjoy prior to division. A member of the joint-family has only a right to demand that a share of existing family-property should be separated and given him; and so long as the family union remains unmodified, the enjoyment of the family-property is, in the strictest sense, common; as against each other the members

of the family have no rights whatever, except that I have mentioned, and the only remedy, for a dissatisfied member, is by partition. But this relation is purely a voluntary one. Like many other relations, which are of frequent occurrence, the law has ascertained and defined, or attempted to ascertain or define, what it is in its unmodified form; but it has not imposed, on any family, the necessity of adopting that relation, or of adopting it in its unmodified form only; it is therefore capable of being modified in every way, and is frequently modified, either by the concurrent will of the family, or by the will of the ancestor from whom the property is derived."

Mode of
enjoyment
of joint
property.

Let us now consider the mode in which joint property is enjoyed by the coparceners. For this purpose it will be convenient to divide joint families into two classes *viz.*, (1) those in which the father is at the head, and (2) those in which an uncle or an elder brother is at the head, of affairs. All the joint families of the present day would fall either under the first or the second class. The reason of the above division of families into two classes must have suggested itself to you. The father is the natural protector in the first group of families. Although the rights of the father and the sons are equal in the ancestral property, yet the father naturally occupies a position of respect and reverence. He is also, as it were, the naturally constituted agent of the sons besides being their protector. The sons are by duty bound not only to be submissive to their father but even to pay his debts with few exceptions. But a family with an uncle or an elder brother at the head, as *kurta*, is in a very different situation. Here the rights of the members are strictly alike; the authority of the *kurta* in such a family is derived by the sufferance of the other members. He may be

removed if it should please the other members to do so.

In the first group of families under the leadership of the father, the rent collections are made in the name of the father. There is generally one *tehvil* or purse, and that remains in the charge of the father; liabilities for rent and revenue, due by the family, are met by the father; the household expenses are all defrayed by the father or are defrayed under his superintendence and guidance; sales and purchases of movable and immovable properties are, as a rule, made by the father and in his own name; marriages of male and female children are celebrated according to the wishes of the father who defrays the expenses; *shrads* and *pujas* are performed according to his desires; expenses of education are defrayed by him according to the actual needs of the family, and, in short, all the affairs of the family are carried on by and in the name of the father. I shall once again call to your recollection the apt observations of Lord Westbury in *Appoovier v. Ramasubba Ayyan* (1866)* which I have elsewhere quoted. In the second group of families under the leadership of an uncle or an elder brother, the rights of the members are equal, and, as in the case of families under the leadership of fathers, sales and purchases of properties are made in single names; but the difference in such cases is that whenever the members are dissatisfied with the management they either appoint another of them selves to be the *kurta*, or associate some one or more of themselves with the existing manager. I do not mean to suggest that in the case of a father being the manager, the sons cannot, as a question of law, with their

In families under the leadership of father.

in other families.

* 8 W. R. P. C. 1; 11 M. I. A. 75. and ante. p. 18.

father's concurrence, constitute one of their number as the manager; but what I say is, that the usual course adopted, when the sons are dissatisfied with the father's management, is to seek a partition.

From what I have stated above it follows that so long as a family is joint and is in the enjoyment of joint property, no individual member can grudge any *bona fide* expenditure in the interests of another member, even when such expenditure is beyond the legitimate share of such member. In a Mitakshara family, it is true, it is idle to speak of a share of any member before partition. But, as we have seen when considering the subject of maintenance, the idea of shares of individual members pervades the whole law and the extent of such shares is well known to the members of the family. Whenever any individual member has reason to be dissatisfied with the management of the father, or is grieved to find that the expenses on behalf of any other member exceed the legitimate share of such member, he seeks a partition of the family property; for, so long as the family remains joint, he cannot prevent any *bona fide* expenditure in the interest of any other member beyond such member's legitimate share.

Liability of
Kurta to
account.

A question frequently arises as to whether a *kurta*, who is oftentimes the eldest of the coparceners, is liable to the others to account. In *Rangan Mani Dasi v. Kasinath Dutt* (1868) 3 B. L. R., O. C., 1., Mr. Justice Markby was of opinion that in an ordinary joint family the *kurta* could not be called to account at the instance of any individual member. Mr. Justice Dwarkanath Mitter in a subsequent case, in which the question of the liability of a *kurta* to account arose, doubted the correctness of Justice Markby's conclusion, though he agreed with him in his view of a joint family. In making the reference to a Full Bench, Justice Mitter

(5 B. L. R. p. 347 *Abhay Chandra Roy Chowdhry v. Pyari Mohon Guho* 1870) said: "It is true that the position of the managing member of a joint Hindu family is, in many respects, different from that of the managing member of an ordinary partnership concern. But the former is not without his responsibilities. He is entitled to obtain credit from his coparceners for all sums of money *bona fide* spent by him for the benefit of the joint family; but he is certainly liable to make good to them their shares of all sums which he has actually misappropriated, or which he has spent for purposes other than those in which the joint family was interested. Of course, no member of a joint Hindu family is liable to his coparceners for any thing which might have been actually consumed by him in consequence of his having a larger family to support, or of his being subject to greater expenses than the others; but this is simply because all such expenses are justly considered to be the legitimate expenses of the whole family. Thus, for instance, one member of a joint Hindu family may have a larger number of daughters to marry than the others. The marriage of each of these daughters to a suitable bridegroom is an obligation incumbent upon the whole family so long as it continues to be joint, and the expenses incurred on account of such marriage must be necessarily borne by all the members without any reference whatever to respective interests in the family estate. The rule would be quite different, it is true, in the case of a partnership concern, every member of which is liable to the others for every pice which he has spent over and above his legitimate share in the business. But this distinction, while it goes to create a material difference in the principle, according to which the accounts are to be adjusted

Views of
Justice D.
N. Mitter.

in the two cases, does not constitute any ground whatever for holding that the managing member of a joint family is not bound to render an account of his managership to the other members if they choose to insist upon it." Sir Richard Couch, in delivering the judgment of the Full Bench, said that the right to call for an account depended upon the right which the members of the joint family had to a share of the property, and that where there was a joint interest in the property, and one party received all the profits, he was bound to account to the other parties who had an interest in it.

To the same effect are the observations of Sargent, C.J., in *Damodardas Manek Lal v. Uttamram Manek Lal* (1892), 1 L. R., 17 Bom. 271 (see p. 278). That learned Judge referring to a previous decision of Justice West says:—"Mr. Justice West is here speaking of the manager's liability to a suit for an account and we do not understand him as meaning that the manager is exempt from any liability to account on the occasion of a partition of the family estate between the members * * * and we think it would be difficult to hold that there is anything in the custom of a Hindu family which can justify the manager in refusing to render any account whatever of his management on the occasion of a partition. * * * What that account should be, so as to discharge him from his liability to account as manager and what objection the other members can take to it must, we apprehend, depend on the conduct of the manager and the other members, the nature of the property and the circumstances of the family and cannot be satisfactorily stated in definite terms." These observations sufficiently lay down the principle on which the account should be taken.

Principle
on which
account
should be
taken.

In *Ratnam v. Govinda Rajulu* (1877) I. L. R. 2 Mad. p. 339 it was laid down, that in the case of improvements of the family property made by the managing member of a Hindu family, where the sum spent was large but the discretion of the managing member was exercised *bona fide* and for the benefit of the estate, and the family, had this benefit, such discretion should not be narrowly scrutinized.

In *Lakshman Dada Naik v. Ram Chandra Dada Naik* (1876) I. L. R. 1 Bom. 561 affirmed by the Privy Council in 1880 I. L. R. 5 Bom. 48, (also 7 C. L. R. 320; L. R. 7 I. A. 181) it was laid down that members of an undivided Hindu family, when making a partition, were entitled, *as a rule*, not to an *account* of past transactions, but to a division of the property actually existing at the date of the partition. The same principles were enunciated in *Konerrav v. Gurrav* (1881) I. L. R. 5 Bom. 589. The reason of this principle as regards adult members living in commensality with the manager is not far to seek. The manager acts as the agent of the members, whose interest in the property, defined (as in a Dayabhaga family) or undefined (as in a Mitakshara family) is joint. He keeps, and need keep, no separate accounts of the individual members. It follows therefore that when called upon to account it would be sufficient for him to show that what he spent was in the interest of the family.

Reason of the rule as regards adult members.

In *Gan Savant Bal Savant v. Narayan Dhond Savant* (1883) I. L. R. 7 Bom. 467 it was held that a minor member of a joint family in the absence of a fraud or collusion was bound by the result of a suit in the name of the manager of the family. *

Minor co-sharers.

* On this point see *Damodar Das Manek Lal v. Uttamram Manek Lal* (1892) I. L. R. 17 Bom. 271.

In *Bhasker Tatya Shet v. Vija Lal Nathu* (1892) 1. L. R. 17 Bombay 512 it was held that the manager of a joint Hindu family could, by acknowledging the liability of the family for a debt properly contracted, give a new start to the Law of Limitations.

Revival of
barred
debt.

In *Gopal Narain Mozoomdar v. Muddomuttu Gooptee* (1873) 14 B. L. R. 21 it was held that the manager of a joint Hindu family had no power, by acknowledgment, to revive a debt barred by the law of limitations except as against himself. This principle was acted upon in *Kumara Sami Nadan v. Pala Nagappa Chetti* (1878) 1. L. R. 1 Mad. 385.

Minor co-
parcener
wrongly
ejected by
manager.

In *Krishna v. Subbanna* (1884) 1. L. R. 7 Mad. p. 564, it was held that the rule, which limits the right of members of a Hindu family seeking partition to a division of the family property existing at the date of the division, does not apply to the case of an infant who has been ejected by the manager from the family house, and excluded from enjoyment of the family property. In such a case the manager is bound to account to the infant for mesne profits from the date of his exclusion. In *Bhivray v. Sitaram* (1894) 1. L. R. 19 Bom. 532 the principle of this decision was extended to the case of an adult member wrongly excluded from the family.

Alienation
by manager.

I shall in the next lecture consider the powers of a manager or *karta* of a joint family to alienate joint property. It goes without saying that when such alienations are made by the manager on behalf of the family and for its benefit, the other members are bound by the transfer. Such alienations in those cases may be looked upon as acts or transactions done by an agent in the due discharge of his functions as such agent, and they would accordingly be binding on the principal.

Nor is this without authority in the Hindu law itself. Yajnavalkya quoted in Mitakshara ch. I, sec. I, para. 28 says "Even a single individual may conclude a donation, mortgage or sale of immovable property during a season of distress for the sake of the family and especially for pious purposes." Vijnaneswara explains this in the following para. thus: "while the sons and grandsons are minors, and incapable of giving their consent to a gift and the like; or while brothers are so and continue unseparated; even one person, who is capable, may conclude a gift, hypothecation, or sale of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as the obsequies of the father or the like, make it unavoidable." Thus there is authority in the Hindu law to support the transactions made by the head of the family. In the case of adult persons their consent to the alienation should be inferred from the fact of their acquiescence or delegation of authority.

Regard being had to the fact that purchases of properties in joint families are, more frequently than not, made in the names of single members, you should not presume separate acquisition by any individual member, simply from the fact of his name appearing as the purchaser in documents, or as the proprietor in the property-registers of the collectors. The following cases may be referred to on this point. *Jowala Buksh v. Dharum Sing* (1866) 10 M. I. A. 511; *Tundan Singh v. Pukh Narayan Sing* (1870) 5 B. L. R. 546; 13 W. R. 347, on appeal to P. C. (1874) 22 W. R. 199. The decisions have proceeded so far as to hold that not only should properties standing in the names of male coparceners be presumed to be joint family properties, but that the presumption

Presumption as to property purchased in the name of a member of the family.

**Presump-
tion when
purchased
in the name
of a female
member.**

should also arise when the names of the wives of the coparceners or of any other female members are used. On this point refer to the case of *Chunder Nath Moitro v. Kristo Komul Sing* (1871) 15 W. R. 357 in which the judgment was delivered by Mr. Justice D. N. Mitter "one of the greatest masters of Hindu Law who has ever administered justice in this country." I have quoted here the observations of Wilson J. in *Nobin Chunder Chowdhry v. Dokhobala Dasi* (1884) I. L. R. 10 Cal. 686, in which the above decision was followed.*

In the Madras High Court, however, Sir Charles Turner C. J. and Justice Muttusami Ayyar in *Narayana v. Krishna* (1884), I. L. R. 8 Mad. 214, held that the presumption of joint property did not arise when the property stood in the name of a female member. The learned Chief Justice said: "There is not, so far as we are aware, any case in which it has been held that, where property stands in the name of a female member of a Hindu family, it is to be presumed that it is the common property of the family, and that it is incumbent on a person who asserts that it is the property of the lady in whose name it stands to prove it. Nor is there any ground on which such a presumption could be founded. Where a family lives in coparcenary, the presumption which exists in the case of male members arises from the circumstance that they are coparceners. On the other hand, the ladies are not, in an undivided family, coparceners: whatever property they acquire by inheritance or gift is their separate estate, and, although it is not unusual for property to be transferred to the name of a female member to protect it from the creditors of the male members or to place it beyond the risk of extravagance on the part of

the male members, such dealings are exceptional and can afford no ground for a general presumption."

While on the question of presumptions I ought to tell you that under the Hindu Law, every Hindu family ought to be presumed to be joint and not separate. In *Naragunty Luchmeedavamah v. Vengamr Naidoo*, (1861) 9 M.L.A., 66; 1 W.R., P.C., 30, their Lordships said that the presumption with regard to a Hindu family is that it remains undivided.

In *Nilkristo Deb Barmono v. Bir Chandra Thakur* (1866) 12 M. L. A., 523; 3 B. L. R., P. C. 13 or 12 W. R., P. C., 21, their Lordships are reported to have said: "The normal state of every Hindu family is joint in food, worship and estate. In the absence of proof of division such is the legal presumption; but the members of the family may sever in all or any of these three things."

In this connection I ought to mention that as a member of a joint family may have some separate property of his own, even while the family is joint, a question frequently arises as to whether when a member of a joint family sues another member for joint possession of any property as family-property, he has not the onus on him to shew that it is the property of the family and not of the defendant exclusively. Now, you know that the onus of proof is always shifting from one party to the other as each step in the chain of facts necessary to be established in a particular case is reached. It is an elementary principle of law that the plaintiff has to start his case, but he may be relieved of this duty by the defendant admitting the correctness of some of his allegations. Then again, certain presumptions of fact arise from the peculiar circumstances of a Hindu family.

Onus of proof as to joint family property.

**Presump-
tion of
jointness.**

**The pre-
sumption
may be
rebutted.**

The question of the shifting of onus depends upon these presumptions. Thus, suppose a Court has to find whether two Hindu brothers are joint or divided. In the absence of any evidence one way or the other, the Court would be justified in presuming them to be joint; for, as we all know, in India living in joint families among brothers is the rule and separation is the exception. In the same way, in a joint family, all property in the possession of any member of the family should, in the absence of evidence one way or the other, be presumed to be the property of the family. But these are mere presumptions and they may be rebutted by proof. Thus, in the former case, if actual separation is proved, the presumption of a family continuing in its normal condition vanishes. So, in the latter case if the acquisition of the property is recent and it is proved, either, that at the time of the acquisition of the property, the family lived from hand to mouth, upon the income of its new property, and that there were no savings wherewith the property in question could be acquired, or, that an individual member acquired the property from out of his own separate income, the presumption of the property being that of the family vanishes. In the latter case, should the party who benefits by the presumption show that the income of the family property was more than sufficient for the maintenance of the family, and that savings were feasible, he would place the presumption on a firm basis. It is very difficult to lay down precise rules on the question of the onus of proof. You should always distinguish what is common from what is rare, and base your presumptions accordingly. Thus, suppose in a certain case, the plaintiff, one of the members of the family, sues to establish against the defendant, the other mem-

ber of the family, that a particular property is the joint property of both. If the defendant asserts that the property in question is his self-acquired property, though he admits the defendant to be his brother, the Court, in the absence of any evidence one way or the other, should in the particular circumstances of the case presume that the parties are members of a joint Hindu family; for, as a matter of fact in a Hindu family, brothers more frequently live as members of a joint Hindu family than otherwise. The Court having reached this stage of the case would be justified in inferring, in the absence of any evidence on either side, that the property in the possession of either of the brothers is the joint property of them both. Thus we find that from the initial finding that the plaintiff and the defendants are brothers (the finding being based on defendant's admission) the Court by degrees, per force of the presumptions of facts, comes to the conclusion that the property in dispute is joint. If in the case supposed, the defendant does not appear and the plaintiff proves that the defendant is his brother, the presumptions would follow all the same. But if the defendant in the case supposed show that the property was acquired at a recent period in his name and that he was an earning member of the family, while plaintiff had no separate earnings, the presumption of the property having been acquired as the joint family-property would be weak and the plaintiff would do well to show that there was a nucleus where-with the property was or could be acquired, *viz.*, that savings were feasible from out of the income of the joint family-property.

In this discussion we have throughout supposed the defendant not to have exclusive possession of the property in dispute at the time of the

action. If the defendant's exclusive possession be proved or admitted, the plaintiff would have to explain away the circumstances which gave the defendant such exclusive possession, before the presumptions can arise.

I have in this connection advisedly used the expression "exclusive possession;" for, in a joint family the possession of one member is not inconsistent with the possession of the whole family.

In *Dhurm Das Pandey v. Mussamat Shama Soondery Debia* (1843) 3 M. I. A., 229; 6 W. R. P.C. 43, their Lordships of the Judicial Committee of the Privy Council said: "It is allowed that this was a family who lived in commensality eating together and possessing joint property. It is allowed that they had some joint property and there can be no doubt that under these circumstances, the presumption of the law is that all the property they were in possession of was joint property, until it was shown by evidence that one member of the family was possessed of a separate property."

This case was followed in *Vedaralli v. Narayana* (1877) I. L. R., 2 Mad. 19.

In *Taruckchunder Poddar v. Jodeshur Chunder Koondoo* (1873) reported in 11 B. L. R., 193; 19 W. R., 178, Sir Richard Couch, C. J., considered all the decisions of the High Court which laid down or seemed to lay down a contrary view, and, upon the authority of the decisions of the Privy Council, said: "Now, with regard to what their Lordships say as to the family being possessed of property, and that the presumption of law is that all the property the family is in possession of is joint property, the rule that the possession of one of the joint owners is the possession of all would apply to this extent that, if one of

them was found to be in possession of any property, the family being presumed to be joint in estate, the presumption would be, not that he was in possession of it as separate property acquired by him but as a member of a joint family. It being so, until in this case it is shewn that Ishur Chunder had acquired it separately, and it was property which could by law be treated as a separate acquisition, the presumption is that it was the joint property of the family. It was for the person who set up a different state of things from what is to be presumed to give evidence of it. It was the duty of the defendant to meet the presumption which arose from the state of the family, and the possession by one of them of the property."

Possession of one member to be presumed possession of family

In *Gobind Chunder Mookerjee v. Doorga Persad Baboo* (1874), 14 B. L. R., p. 337; 22 W. R., 248, Sir Richard Couch, C.J., in reversing the judgment of Justice Pontifex observed: "I have said that the defendant must be taken to have known what is the presumption of Hindu law. That is stated by the Judicial Committee of the Privy Council for the first time, as far as I am aware in *Luximon Row Sadasew v. Mullar Row Bajee* (1831) 2 Knapp p. 60; 5 W. R., P. C., 67. Their Lordships there decided that in a suit for the division of the property of an undivided Hindu family, the whole of the property of each individual is presumed to belong to the common stock and it lies upon the party who wishes to except any of it from the division to prove that it comes within one of the exceptions recognised by the Hindu law." Again on page 350 he is reported to have said: "In these decisions I do not find it anywhere laid down that the plaintiff need give any other evidence than that there is an undivided Hindu family. The presumption then applies."

Nor need he in fact give evidence that the family is undivided, although it is advisable to give it when it is possible to do so; and so it is to give evidence that there was family-property from which the acquisition could be made in anticipation of evidence that may be given to rebut the presumption." The principle laid down in these decisions was followed in *Cassumbhoy Ahmedbhoy v. Ahmedbhoy Hubibbhoy* (1887), 1. L. R., 12 Bom. 280, (see page 309), and in *Vedavalli v. Narayana* (1877) I.L.R., 2 Mad. 19 (see p. 22). The contrary view was taken in the cases noted by Sir Richard Couch, C.J., in *Taruck Chunder Poddar's* case already considered and also in *Lakshman Mayaram v. Jamna Bai* (1882) 1. L. R., 6 Bom. 225 (see p. 232). The rule laid down in this last case is that where there was ancestral property by means of which other property may have been acquired, there it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate. To the same effect are the observations of Justice Scott in *Toolsey Das Ludha v. Premji Tricumdas* (1888) 1. L. R., 13 Bom. p. 61. On p. 66 Justice Scott is reported to have said, "Although presumably every Hindu family is joint in food, worship or estate, there is no presumption that every family possesses property. Unless there is an admitted nucleus of family property the onus of proof of the existence of joint property lies on the claimant. In the present case there is no such nucleus and the brothers embarked in separate trades." The learned judge found on evidence that there was no nucleus; so the presumption was rebutted. On this point the case of *Murari Vithoji v. Mukund Shivaji* (1890) 1. L. R., 15 Bom. 201, may be referred to.

**Ancestral
trade.**

In many families, trade is one of the valuable (if not the most valuable), sources of income. Such

trades descend like other heritable property and all the heirs—adults as well as infants—participate in the profits as in any other joint ancestral property. Generally the head man (the *kurta* or managing member of the family) manages the business as part of the ancestral property.

Now, the rights and liabilities of the partners, *inter se* as well as with regard to third persons, are ordinarily determined according to the provisions of chapter V of the Contract Act IX of 1872. Thus, we know that in every ordinary case of partnership, the death of any partner dissolves the partnership. But in the case of ancestral trades under the Hindu law, they do not cease upon the death of any partner. In *Ram Lal Thakursidas v. Lakmichand Muniram* (1861) 1 Bom. H. C. Rep. App. 51, the Court held that an ancestral trade might descend like other heritable property upon the members of a Hindu undivided family and that persons carrying on a family business, in the profits of which all the members of the family would participate, must have authority to pledge the joint family-property and credit for the ordinary purposes of the business. The Court said, "The power of a manager to carry on a family trade necessarily implies a power to pledge the property and credit of the family for the ordinary purposes of that trade. Third parties in the ordinary course of *bona fide* trade dealings should not be held bound to investigate the status of the family represented by the manager while dealing with him on the credit of the family-property. Were such a power not implied, property in a family trade which is recognised by Hindu law to be a valuable inheritance, would become practically valueless to the other members of an undivided family wherever an infant was concerned; for no one would deal with a manager, if the minor

Minors bound like adults by manager's transactions in reference to ancestral trade

were to be at liberty on coming of age to challenge, as against third parties, the trade transactions which took place during his minority. The general benefit of the undivided family is considered by Hindu law to be paramount to any individual interest, and the recognition of a trade, as heritable property, renders it necessary for the general benefit of the family that the protection which the Hindu law generally extends to the interests of a minor should be so far trenced upon as to bind him by the acts of the family manager, necessary for the carrying on and consequent preservation of that family-property ; but that infringement is not to be carried beyond the actual necessity of the case." In *Johurra Bibec v. Sree Gopal Misser* (1876) 1 L. R., 1 Cal., p. 470, the principles of the above decision were approved, and it was held that a joint family-property acquired and maintained by the profits of a trade is subject to all the liabilities of that trade.

No difference in this respect between Mitakshara and Dayabhaga.

In *Bemola Dossee v. Mohun Dossee* (1880) 1 L. R., 5 Cal. 792 ; 6 C. L. R., 34, Sir Richard Couch, C. J., in dismissing the appeal from Justice Wilson's decision, approved of the observations in *Ramlal Thakursidas* quoted by me above, and said that he saw no difference in respect of the law so laid down between families governed by the law of the Mitakshara and the law of Dayabhaga.

Limit of minor's liability.

In *Joykisto Cowar v. Nittyannund Nundy* (1878), 1 L. R., 3 Cal. 738 ; 2 C. L. R. 440, the case in 1 Bom. H. C. Reports was followed as to the manager's power to bind the family, but the learned Chief Justice thought the limit prescribed by sec. 247 of the Contract Act as to the liability of a minor partner was a proper limit. In *Samalbhai Nathubhai v. Someshvar Mangal* (1887), 1 L. R., 5 Bom. p. 38, it was held that the rights and

liabilities arising out of joint ownership in a trading business created through the operation of Hindu law between the members of an undivided Hindu family cannot be determined by exclusive reference to the Indian Contract Act, but must be considered also "with regard to the general rules of Hindu law, which regulate the transactions of united families, and that an ancestral trade may descend like other inheritable property upon the members of a Hindu undivided family. The partnership so created or surviving has many, but not all, of the elements existing in an ordinary partnership. For example, the death of one of the partners does not dissolve the partnership; nor as a rule, can one of the partners, when severing his connection with the business, ask for an account of past profits and losses."

Incidents of partnership not determined solely by Contract Act.

Death of a partner effects no dissolution.

Outgoing partner entitled to share only in existing assets

In this connection, I ought to mention that there is a conflict of opinions as to whether, in a trading concern upon the death of one of the partners, the right of suit would survive to the remaining partners, and it would not be necessary for the heirs of the deceased partner to obtain a certificate of succession. In *Gobind Prasad v. Chandar Sekhar* (1887), I. L. R., 9 All. 486 the Court held that the surviving partners in the absence of the representatives of the deceased partner might carry on a suit for a partnership debt. But in *Ramnarain Nursing Doss v. Ram Chunder Jankee Loll* (1890), I. L. R., 18 Cal. 86, the Judges declined to follow this ruling. A certificate would, however, be necessary in the case of a suit upon a bond given to one of the members of a joint family where, upon the face of the bond it does not appear that the debt is due to the joint family. See *Venkataramanna v. Venkayya* (1890), I. L. R., 14 Mad. 377. Ordinarily upon the death of an undivided coparcener,

Whether succession certificate is necessary upon death of a partner.

the survivors take by survivorship and hence there is no necessity for a succession certificate.

Certificate
cannot be
granted to
manage the
undivided
interest of a
minor

Let us next consider whether a guardian can be appointed by the Civil Court under the Guardian and Wards Act VIII of 1890 in respect of a minor coparcener in an undivided Mitakshara family. In *Durga Persad v. Kesho Persad Singh* (1882), I. L. R., 8 Cal. 656; I. R., 9 I. A., 27; 11 C. L. R., 210, their Lordships of the Privy Council held that the manager of an undivided Mitakshara family, although he might have the power to manage the estate, was not the guardian of the infant co-proprietors of that estate for the purpose of binding them by a bond, or for the purpose of defending suits in respect of money advanced with reference to the estate. Certain observations made by their Lordships in the case might seem to suggest that in their Lordships' opinion an application might be made for certificate under Act XL of 1858, which has been replaced by the Guardian and Wards Act VIII of 1890, in respect of the estate of an infant coparcener. But their Lordships had not to consider the point directly in the case under consideration. On the other hand it has been held by the Calcutta and the Bombay High Court that a certificate cannot be granted by the Civil Courts in respect of the undivided interest of a minor coparcener in a Mitakshara family. See *Sheo Nundun Singh v. Ghunsam Kooeree* (1874), 21 W. R., 143; *Aghola Kooeree v. Digambur Singh* (1875), 23 W. R., 206; *Gourah Koeri v. Gujadhur Purshad* (1879), I. L. R., 5 Cal. 219; 4 C. L. R., 398; *Sham Kuar v. Mohanunda Sahoy* (1891) I. L. R., 19 Cal. 301; *Shivji Hasam v. Datu Mavji Khoja*, (1874) 12 Bom. H. C. Rep., 281; *Guracharya v. Svamirayacharya* (1879) I. L. R., 3 Bom. 431, and *Narsingrav Ram Chandra v. Venkaji Krishna* (1884) I. L. R., 8 Bom., 395.

LECTURE III.

The Law of Alienations of Ancestral Property.

Father's powers of alienation of ancestral movables and immovables alike—Power of alienation of immovable property for legal necessity—of ancestral movables for legal necessity—Father's powers over acquired immovables absolute—Wrong translation of text—self-acquisition thrown into common stock—Father's power over acquired movables—Position of the managing member—Resemblance between Joint family and Partnership Concern—In early days ancestral immovables were alienated for necessity—but undivided shares in them were seldom alienated—Voluntary alienation of a coparcener's interest in joint ancestral property—The law as understood in Bengal—An undivided coparcener's interest in ancestral property not alienable—The law is the same in the N.-W. Provinces—Consideration money or debt made a charge on coparcener's interest when sale or mortgage is declared invalid—Law otherwise in Madras and Bombay—Law as to gifts and devises—Law of compulsory sale of an undivided coparcener's interest same everywhere—Effect of such sale—rights of purchaser to partition—what is the point of time which determines the share of the purchaser—Alienation by the whole body of coparceners—when some of them are minors—growth of the power of alienation—Legal necessity - Circumstances in which one coparcener can alienate family-property—when coparceners are minors—when they are adults—Implied consent of adult coparceners—Sale to avert calamity—to provide husband for daughter or sister—for obsequies of father—for maintenance of family—for preservation of property—for payment of debts due from father or grandfather—Texts providing for payment of debts generally—Vishnu—Narada—Brihaspati—Yajñavalkya—Whether sons are bound to pay their father's debts during his lifetime—Father's debts have to be paid whether the family is benefited or not—The whole ancestral property is liable for father's debts during his lifetime—only such portion to be alienated as is absolutely necessary—Powers of managers—Hunooman Persaud Pandey's case applied to cases of sales by managing members in Mitakshara families—Hunooman Persaud Pandey's case—Enquiry into necessity by lender—*De facto* manager to be held rightful manager—Transfer of Property Act—Voluntary alienations of family-property—what has the purchaser to prove when his purchase is questioned - Onus to prove character of debts—Sons to prove purchaser's knowledge of debts being for immoral purposes—Effect of decision in Suraj Bansi's case—"Antecedent debt"—Recitals in deeds

no evidence of necessity—Cases where the alienation would not bind the family-property but would be good against the interest of a coparcener—Decree in cases where purchaser is entitled to a coparcener's interest—Sale of properties in execution of decrees—whether interest of judgment debtors only pass—Conflicting decisions—Doubts settled by P. C. decisions—Suits should be against all coparceners—even when the mortgage is executed by one member—Enquiry as to what has been actually purchased—Certificates of sale vague—when sale takes place in execution of mortgage decree—If father be mortgagor whole interest passes unless sons show the debt was immoral—when the debtor is any other member—Sale in money decree—when money decree is against father and purchaser proves purchase of entire property—when money decree is against any other member, purchaser to show he purchased whole and for legal necessity—difference between the positions of an execution purchaser and a purchaser at a private sale according to old decisions—Debt must be shown to have been immoral to alienor's knowledge—When the debt is illegal or immoral, father's share is liable—when debt is immoral, creditor would have no remedy against sons after father's death—Exceptions—if the debt be not immoral or illegal, father's death does not defeat the rights of his creditors against his sons—A private sale failing as to entire interest may be valid as to a coparcener's interest—Difference between the law of Bengal and N. W. P. and that of Bombay and Madras—After-born sons—Ratification—Equities which arise on setting aside sales—No refund in cases of execution sales—but consideration money must be refunded by plaintiff if he should be otherwise liable for it—Court may declare lien of purchaser on setting aside a sale—Reported cases on the subject of this Lecture do not all seem to be reconcilable.

Father's powers of alienation of ancestral movables and immovables alike.

We have in the preceding Lecture seen that in the case of movables and immovables inherited by a man from his father, grandfather or great-grandfather, his sons and grandsons from the moment of their births become his coparceners. The texts as well as the case-law make no distinction between movables and immovables inherited by the man, in prescribing restraints on his power of alienation and of partitioning them among his sons and grandsons. The reason why in dealing with the subject of alienation, the ancient Hindu lawgivers considered the powers of the father and not of any other member of the joint family, must have suggested

itself to you. The father occupies in a family the position of a superior member, and by restricting *his* powers of alienation they restricted the powers of the members generally. For, what a father, as a coparcener, cannot alienate, any other member cannot also alienate.

I shall consider here the father's powers to alienate ancestral movables and immovables and reserve for a future Lecture, the discussion of his powers to partition. The power to alienate may be discussed under two heads :—(1) in reference to ancestral immovables and (2) in reference to ancestral movables.

(1) Para. 27* sec. I ch. I, Mitakshara provides that the father has no independent power to dispose of ancestral immovable property. If the commentator had stopped here, neither a father nor any other member of a joint family would have been competent to dispose of, on behalf of himself and others of the family, any immovable property of the family under any circumstances. But an exception is made in the next para.—“ Even a single individual may conclude a donation, mortgage or sale of immovable property during season of distress, for the sake of the family, and especially for pious purposes.” This is a text of Brihaspati and Vijnaneswara explains it thus in para. 29: “ while the sons and grandsons are minors and incapable of giving their consent to a gift and the like, or, while brothers are so and continue unseparated, even one person who is capable may conclude a gift, hypothecation or sale of immovable property, if a cala-

Power of
alienation
of immov-
able prop-
erty for
legal neces-
sity.

* “ Therefore it is a settled point that property in the ancestral estate is by birth although the father have independent power in the disposal of effects other than immovables, for indispensable acts of duty..... but, he is subject to the control of his sons and the rest in respect to the immovable estate.”

mity affecting the whole family require it, or the support of the family render it necessary, or indispensable duties, such as, the obsequies of the father or the like, make it unavoidable." Here, it should be observed, the alienation contemplated is the alienation of the interest of the whole family and not of any particular individual. It should also be observed that upon the happening of the contingencies contemplated, not only would the father but *any* member who looks after the family concerns be competent to dispose of the family-property. Nay more, even the Committee of an insane father and head of a joint family would be competent to mortgage, or sell family-property for the benefit of the family. As to the powers of the father or any other member see *Luchmun Koer v. Madura Lall*. S. D. A. N.-W. P. 327; *Motee Lall v. Mitterjeet Sing* (1836), 6 Select Reports p. 71; *Sheo Persad Jha v. Gungaram Jha* (1866), 5 W. R. 221; *Kantoo Lall v. Greedharee Lall* (1868), 9 W. R. 469. *Duleep Singh v. Sree Kishoon Pandey* (1872) 4 N.-W. P. 83; *Mittrajit Singh v. Raghubansi Singh* (1871) 8 B. L. R. Ap. 5; *Darsu Pandey v. Bikarmajit Lal* (1880) 1. L. R. 3 All. 125. As to the power of the Committee see *Abilakh Bhagat v. Bheki Mahto* (1895) 1. L. R. 22 Cal. 864.

I may here mention that there is no difference of opinion as regards this class of property.

Of ancestral movable property for legal necessity.

(2) The author of the *Mitakshara* includes movables and immovables under the term "heritage" in ch. I, sec. I, para 2. He, then, without distinguishing the movables from the immovables, says in para. 3, sec. I, ch. I, that the unobstructed heirs or heirs get the unobstructed heritage. It is true that in para. 27, after stating in clear terms that property in ancestral estate (movable and immovable) is by birth, he distinguishes the two kinds of property—ancestral movables and ancestral

immovables—and says, that as regards the former the father has independent power of disposal for certain purposes therein enumerated *i. e.*, for indispensable acts of duty and for purposes prescribed by texts of law, as gifts through affection, support of the family, relief from distress and so forth, whereas as regards the immovables they should not be disposed of by the father without convening his sons. But the difference is very slight and even this is not consistently maintained; for, in paras. 28 and 29 quoted above, the father—nay, any member of the family—has been given the power to alienate any immovable property of the family by sale, gift, or hypothecation, in the same contingencies as those in which he may alienate any movable property; and thus the author quotes, in para. 3 sec. V, ch. I, the text of Yajnavalkya Book II, V. 121, *viz.*, “For the ownership of the father and son is the same in land, which was acquired by the grandfather, or in a corrody, or in chattels which belonged to him.” As from the nature of things a greater regard has always been paid to immovables, by fathers in management of family affairs, and in cases of necessity, where ancestral immovables might also have been justly sold, movables were disposed of, an impression has been created that the father's powers over ancestral movables are absolute. But there is no foundation for it in the texts.

You should in this connection note that paras. 27, 28 and 29 sec. I ch. I Mit. have reference to an alienation of the family-property, while para. 30 refers to the sale of the undivided interest of a single coparcener.

Let us next examine the case-law.

In *Lakshman Dada Naik v. Ram Chandra Dada Naik* (1876) I. L. R. 1 Bom. p. 561 (see

p. 567) it is said :—" Such are the provisions of the Mitakshara which are similarly stated by Sir Thomas Strange. " Even of *movables*, if descended, such as precious stones, pearls, clothes, &c., &c., any alienation to the prejudice of heirs, should be, if not for their immediate benefit, at least of a consistent nature. They are allowed to belong to the father, but it is under the special provisions of the law. They are his; and he has independent power over them, if such it can be called, seeing that he can dispose of them only for imperious acts of duty and purposes warranted by texts of law; while the disposal of the land whencesoever derived, must be, in general, subject to their control; thus in effect leaving him unqualified dominion over personalty acquired." The Mayukha (ch. IV sec. I para. 5) limits the powers of the father even more strictly— " As for this text, 'the father is the master of all gems, pearls and corals: but neither the father nor the grandfather is so of the whole immovable estate', it also means the father's independence only in the wearing and other use of ear-rings, rings, &c., but not as far as gift or other alienation." In *Baba v. Timma* (1883) I. L. R. 7 Mad. 357 a Full Bench of the Madras Court held that a Hindu father while unseparated from his son has no power except for purposes warranted by special texts to make a gift to a stranger of his undivided share in the ancestral estate, *movable or immovable*.

In *Jugmohan Das Mangal Das v. Sir Mangal Das Nathubhoy* (1886) I. L. R. 10 Bom. p. 528, which was a case of compulsory partition at the instance of a son during his father's lifetime and not of alienation, the judges declined to make any distinction between ancestral movables and immovables.

From these texts and cases it seems clear

that the powers of a father to deal with ancestral property are very limited and that his alienations can be supported, only when effected for purposes recognised by the Hindu law, and further that his sons and grandsons, who by birth are his coparceners, can question the legality of his alienations.

Let us next consider the powers of a father over his acquired property. To begin with the self-acquired immovables: the text of Vyasa on this subject quoted in para. 27 sec. I, ch. I of the Mitakshara runs in these words:—“Though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born and they who are yet unbegotten and they who are still in the womb, require the means of support; no gift or sale should therefore be made.” The commentator upon the authority of this text says,—“but he (father) is subject to the control of his sons and the rest in regard to the immovable estate *whether acquired by himself or inherited from his father or other predecessor.*” If this text and commentary had stood alone, there would not have been any difficulty in interpreting the law, and probably then, the case-law would have placed all immovable property, whether acquired or ancestral, under the same restrictions. But then, there is another commentary in ch. I sec. V, para. 10, and from the earliest times the translation furnished to our administrators of justice has made it run thus—“the son must acquiesce in the father’s disposal of his own acquired property.” As it runs, it contradicts the commentary as well as the text of Vyasa in para. 27, sec. I, ch. I of the Mitakshara quoted above. But the word which has been translated into “property” really means article or “movable property.”

Father's
power over
acquired
immovables
absolute.

Wrong
translation
of text.

If the commentary had been correctly translated there would not have been any contradiction.

The civilized ideas of the modern times fit in well with the theory that the acquirer of a property ought to have absolute powers of disposal over it, and, accordingly with the contradiction before them, our courts of law have given the father absolute dominion over his self-acquired immovables.

In *Raja Bisheṇ Perkaśh Narain Singh v. Bawa Misser* (1873) 12 B. L. R., 430; 20 W. R., 137 the Judicial Committee of the Privy Council held, on the authority of the *Vivada Chintamani*, that one might give away at his pleasure his self-acquired property to any body and that the father had full power over the property of *his* father which, having been seized, was recovered by his own exertions or over what was gained by him through skill, valour or the like.

In *Sital v. Madho* (1877) I. L. R., 1 All. p. 394, Justices Spankie and Oldfield upon a consideration of the texts and case-law held that the father could validly give away his self-acquired immovable property. The same principles were adopted by the Madras High Court in *Subbayya v. Surayya* (1886) I. L. R., 10 Mad. 251. The Bombay High Court in *Jugmohan Das Mangal Das v. Sir Mangal Das Nathubhoy* (1886) I. L. R., 10 Bom. p. 528, speaking of the doubt at one time entertained by the Madras Court as to the right of the father to dispose of his self-acquired property says*:—"But that view is inconsistent with what must now be considered as well settled, *viz.*, that, notwithstanding the language of that section, at any rate as regards the self-acquired property of the father, whether movable or immov-

able, the right of "sons and the rest," which would include grandsons, is an imperfect one, and that the restriction on the father's power of disposal is in the nature of a moral injunction which may affect conscience; but that for all legal purposes as between the father, on the one hand, and the "sons and the rest," on the other, his power is absolute." Of course it is competent to the acquirer of the property to throw it into the common stock with the intention of abandoning all separate claims upon it. In such a case the property would be the joint property of the family. See *Krishnaji Mahadev Mahajan v. Moro Mahadev Mahajan* (1890) I. L. R., 15 Bom., 32.

Self-acquisition thrown into common stock.

The Hindu lawyers, as we have already seen, divide property into movables and immovables. They show a marked anxiety for the immovable property, whether acquired or ancestral. But as regards the movables they seem indifferent. Nor is this without reason. India has all along been an essentially agricultural country. Land has always a special value to its owner, but the movables of the days of our Hindu legislators were hardly of any value. Accordingly we find that sales of lands were enjoined to be made publicly with consent of townsmen, of kinsmen, of neighbours and heirs and by gift of gold and of water (*vide* para. 31, sec. I, ch. I Mitak.). But no such formalities were prescribed for the sale of the movables, and the father has always exercised an absolute power over them. The very text, which we noticed above in the case of acquired immovables as wrongly translated, clearly applies to movables and thus both the texts and the case-law give the father absolute dominion over his acquired movables.

Father's power over acquired movables.

I have here considered the powers of a father over the various classes of property in view of the

**Position
of the
managing
member.**

fact that the father is the head or managing member of a large number of joint families governed by the Mitakshara law. In families in which the managing member is not the father or the grandfather, the acquirer of property, movable or immovable, has absolute dominion over his acquisitions all the same; and alienations of family property made by the managing member bind the other members, only when such alienations are made in the interest of the family. "The managing member is merely the constituted agent of the family, the chairman of the corporation. By virtue of his appointment, he transacts business with the outside world in the interest of the family and so long as he does not exceed his authority his transactions bind the members." The appointment, generally, is not made under any written instrument. It is oftentimes made in consideration of seniority in age and relationship, and with due regard to business-habits. Of the members, some may be minors and, therefore, incapable of exercising any discretion in the selection of the manager. The appointment, therefore, is often made by some capable member assuming the management with the tacit consent of the other members. And the managing member, once appointed in this manner, continues as long as he actually looks after the affairs of the family, and the other members suffer him to continue. It not unfrequently happens, that when the managing member finds age telling upon him, he gives up the management in favour of some other member.

From what I have above stated let it not be inferred that so long as the managing member looks after the family affairs, the other members cannot have any voice in the internal management. On the contrary, in several families, the

managing member acts in conference with the adult members. Their mode of operation reminds one of the analogy that exists between joint families and partnership concerns. I have elsewhere quoted the language used by Justice Markby in *Rangan Mani Dasi* v. Kasinath Dutt* to contrast a joint family with a partnership concern. I shall now show the points of resemblance between them. In a partnership concern, each partner who does any act necessary for, or usually done in carrying on, the business of the partnership, binds his partners to the same degree, as if he were their agent duly appointed for that purpose. In a joint family too, notwithstanding that the managing member generally looks after the family affairs, yet, should any other member in the interest of the family enter into a transaction with one outside the family circle, such transaction would be binding on the family. And we accordingly find our early lawgiver Brihaspati laying down.—“Even a single individual (meaning any member of the joint family) may conclude a donation, mortgage or sale of immovable property during a season of distress, for the sake of the family and especially for pious purposes.” From the fact, that our ancient legislators attached greater importance to immovables than to movables, you will see that the subject of restraints on alienations has reference mainly to ancestral immovables. And again you will hardly find any allusion made by our early lawgivers to alienations of the interest of any individual member. Such a contingency, regard being had to their theory that no individual member had any property before partition, was with them an occurrence that could seldom come to pass and accordingly the only rule

Resemblance between joint family and partnership concern.

In early days ancestral immovables were alienated for necessity.

But undivided shares in them were seldom alienated.

* 3 B. L. R., O. C., 1 See p. 79 ante.

provided for is that contained in para. 30 *viz.*, that the interest of an undivided member can only be alienated with the consent of all the members. But, as we shall see presently, the courts of justice have in some localities held sales of individual interest valid, and where they have declared voluntary alienations to be invalid, compulsory sales in execution of decrees have been ruled to be valid. The subject of alienations, therefore, may be conveniently treated under two heads:—(1) the law of voluntary alienations of the undivided interest of a single coparcener in ancestral property including the law of compulsory sale of such interest in execution of decree against such coparcener and (2) the law of voluntary alienations of the entire coparcenary interest in a property by the managing member of the family including the father and also the law of compulsory sale of such interest in execution of decree against such member.

Voluntary alienation of a coparcener's interest in joint ancestral property.

(1) If you will call to mind the words of Lord Westbury in *Appoovier v. Rama Subha Ayyan* (1866) 11 M. I. A. 75; 8 W. R., P. C. 1, already* quoted by me and if you will also recall the discussion† that partition is the origin of property, you will at once perceive that in an undivided Mitakshara family, no member has any definite share in the family-property, and that the shares for the first time arise at a partition. In such a state of things, a purchaser of the inchoate interest of a single member would be entitled (supposing the law allows a private sale of such interest) to such share only as would be allotted to such member at a general partition of the family-property.

The law as to whether under the Mitakshara an undivided member of a joint family in posses-

* Ante p. 18.

† Ante p. 42.

sion of coparcenary property can mortgage or sell his undivided interest in any portion of the family-property is contained in Mit. ch. I, sec. I, para. 30, which runs in these words:—"Among unseparated kinsmen, the consent of all is indispensably requisite, because no one is fully empowered to make an alienation since the estate is in common," and Sir James Colville in delivering the judgment of the Judicial Committee in *Suraj Bansi Koer v. Sheo Persad Sing* (1878) I. L. R. 5, Cal. 148; 4 C.L.R. 226 or L.R., 6, I.A. 88 said, "There can be no doubt that all alienations, whether voluntary or compulsory are inconsistent with the strict theory of a joint and undivided Hindu family." But at present the case-law has interpreted the law differently in the different Provinces.

In Bengal, as early as 1823, in *Nundram v. Kashee Pande* (reported in 3 Select Reports p. 232) the question was put to the Law Officers of the Court, whether it was lawful under the Mithila law for one of several undivided coparceners to transfer his share by sale or gift, and the Pundits referring to the Mitakshara (which in this respect is the same as the Mithila law) replied that a gift even to the extent of the donor's share was not valid and that before partition no member had any property to sell or give away. The Court acted upon this answer.

The law as understood in Bengal.

The law laid down in the above case was followed in 1826 in *Sheo Surrin Misser v. Sheo Sohail* reported in 4 Select Reports p. 158, in 1832 in the case of *Jivan Lall Sing v. Ram Govind Sing* reported in 5 Select Reports p. 163, in 1837 in the case of *Sheo Churn v. Jummun Lal* reported in 6 Sel. Rep. p. 176, in 1853 in *Mussummat Roopna v. Ray Reotee Rumeen* reported in S. D. A. Rep. Bengal p. 344 and in 1865 .

An undivided coparcener's interest in ancestral property not alienable.

in *Cosserat v. Sudaburt Pershad Sahoo* 3 W. R. 210.

In *Sadabart Prasad Sahu v. Foolbash Koer* (1869) 3 B. L. R., F. B. p. 31; 12 W. R., F. B. 1 a Full Bench of the Calcutta High Court, upon a consideration of the original texts and decided cases, came to the conclusion that a member of a joint Hindu family governed by the Mitakshara Law had no authority to mortgage his undivided share in a portion of the ancestral joint-family property in order to raise money on his own account and not for the benefit of the family. It was brought to the notice of the Court that the law in the N.-W. Provinces was to the same effect, but that it was different in the other Presidencies. The Chief Justice Sir Barnes Peacock, in delivering the judgment of the Full Court, observed:—"The decisions founded on the doctrine of the schools of southern India and of Bombay, though entitled to great weight are not sufficient to justify this Court in a case governed by the Mitakshara law in overruling a long series of decisions expressly founded upon that law." And again "In that case (*Appoovier v. Rama Subba Ayyan*) their Lordships stated that they would be unwilling to reverse any rule of property which had been long and consistently acted upon in the Courts of the Presidency; and we must, I think be guided by the same principle." The Full Bench based their judgment upon Mitak. ch. I, sec. I, V. 30 which * has been already quoted. Sir Barnes Peacock, C. J., added "According to the law of England, if there be two joint-tenants, a severance is effected by one of them conveying his share to a stranger, as well as by partition; but joint-tenants under the English

law are in a very different position from members of a joint Hindu family under the Mitakshara law; for instance, if a Hindu family consist of a father and three sons, any one of the sons has a right to compel a partition of the joint ancestral property (Mit. ch. I sec. 5, V. 8); but upon partition during the lifetime of the father, his wives are entitled to shares; and if partition is made after the death of the father, his widows are entitled to shares, and daughters are entitled to participate;— (Mitakshara ch. VII). If partition be made during the lifetime of the father, and another brother is afterwards born, that brother alone will be entitled to succeed to the share allotted to the father upon partition, (Mitakshara ch. I, sec. 6); but so long as the family remains joint, and separation has not been effected either by partition or by agreement, such as that recognised in the case above cited from the Privy Council, every son who is born becomes, upon his birth, entitled to an interest in the undivided ancestral property. In such a case, neither the father nor any of the sons can at any particular moment, say what share he will be entitled to when partition takes place.

“The shares to which the members of a joint family would be entitled on partition are constantly varying by births, deaths, marriages, &c., and the principle of the Mitakshara Law seems to be that, no sharer, before partition, can, without the assent of all the co-sharers, determine the joint character of the property by conveying away his share. If he could do so, he would have the power by his own will, without resorting to partition, the only means known to the law for that purpose, to exclude from participation in the portion conveyed away those who by subsequent birth, would become members of the joint family, and entitled to shares upon partition.”

This case of *Sadabart's* was appealed to the Privy Council (*vide* *Phoolbas Koonwar v. Lalla Jogeshur Sahoy* (1876) I. L. R., 1 Cal. p. 226),* but Sir James Colvile in delivering the judgment said (see p. 248) : " Their Lordships abstain from pronouncing any opinion upon the grave question of Hindu law involved in the answer of the Full Bench to the second point (the question of alienation by a single undivided member of his individual interest) referred to them, a question which, the appeal coming on *ex parte*, could not be fully or properly argued before them."

In *Deen Dyal Lal v. Jugdeep Narain Singh* (1877) I. L. R., 3 Cal. 198† (p. 208) their Lordships are reported to have said " They do not think it necessary or right in this case to express any dissent from the ruling of the High Court in *Sadabart's* case as to voluntary alienations."

In *Suraj Bansi Koer v. Sheo Persad Singh* (1878) I. L. R., 5 Cal. 148 ; 4 C. L. R., 226 ; L. R., 6 I. A., 88, Sir J. Colvile, in delivering the judgment of the Judicial Committee, said : " There can be little doubt that all alienations, whether voluntary or compulsory, are inconsistent with the strict theory of a joint and undivided Hindu family ; and the law as established in Madras and Bombay has been one of gradual growth founded upon the equity which a purchaser for value has, to be allowed to stand in his vendor's shoes, and to work out his rights by means of a partition. See 1 *Strange Hindu Law*, first Edition p. 179 and App., Vol. II, pp. 277 and 282."

" In Bengal, however, the law which prevails in the other Presidencies as regards alienation by

* L. R., 3 I. A., 7 or 25 W. R., 285.

† L. R., 4 I. A., 247 or 1 C. L. R. 49

private deed has not yet been adopted. In a leading case on the subject, that of *Sadabart Prasad Sahu v. Foolbash Koer* (3 B. L. R., F. B., 31) the law was carefully reviewed, and the Court, refusing to follow the Madras and Bombay decisions, held that, according to the Mitakshara law as received in the Presidency of Fort William, one coparcener had not authority, without the consent of his co-sharers, to mortgage his undivided share in a portion of the joint family estate in order to raise money on his own account, and not for the benefit of the family." •

The ruling in *Sadabart's* case, thus approved of by the Privy Council in *Suraj Bunsis*'s appeal, has been the leading authority in Bengal as regards voluntary alienations. The principle of these decisions was subsequently again acted upon by the Privy Council in 1890 in the case of *Madho Parshad v. Mehrban Singh* (1890) I. L. R., 18 Cal. 157. The principle is that no single member, in an undivided family, governed by the Mitakshara, can mortgage or voluntarily sell his interest in the family property for his own purposes and not for the benefit of the family.

In the North-Western Provinces the law is the same as in Bengal in reference to alienations of a coparcener's interest. The earliest case on the point is *Jey Narain Singh v. Roshun Singh*, S. D. A., N.-W. P., Vol. I. (1860) p. 162. The principle laid down in this case was adopted in 1864 in *Byjnath Singh v. Rameshur Dyal* S. D. A., N.-W. P. 1864 Vol. I. p. 299. In *Chamailikuar v. Ram Prasad* (1879) I. L. R., 2 All. 267 a majority of the Full Bench of the Allahabad High Court, upon a consideration of the texts of Hindu law and all the earlier decisions on the point, adopted the principle laid down by the Calcutta Court in *Sadabart's* case. Justice Oldfield, one of the Judges in the Full Bench is

Same in the
N.-W. P.

reported to have said (on p. 273): "I have not been able to find any case where a voluntary sale was held valid to the extent of the seller's own interest."

The principle laid down in the above case was followed in *Ramanand Singh v. Gobind Singh* (1883) I. L. R. 5, All. 384. The law of voluntary alienations in Bengal and the N.-W. Provinces would thus prohibit an undivided coparcener from making a valid alienation of his undivided interest.

Consideration money or debt made a charge on coparcener's interest when sale or mortgage declared invalid.

But from this it does not follow that a Court of equity would be bound unconditionally to declare a mortgage or a sale of an undivided coparcener's interest invalid, so as to allow the coparcener, (mortgagor, or vendor) to profit by his own wrong. Thus in *Mahabeer Persad v. Ramyad Sing* (1873) 12 B. L. R., 90; 20 W. R. 192, Justice Phear, in setting aside a mortgage of an undivided coparcener's interest, declared that the property was to be thenceforth held in defined shares, and that the lien of the mortgage money would attach to the mortgagor's share. This decision of the High Court was quoted with approbation by the Privy Council in *Madho Parsad v. Mehrban Sing* (1890) I. L. R. 18, Cal. 157.

Law in Bombay and Madras Presidencies.

In Bombay and Madras the law has always been otherwise. There a mortgage as well as a sale for value of the interest of one undivided member has always been held to be valid. The Bombay cases which may be referred to on the point are *Damodhar Vithal Khare v. Damodhar Hari Soman* (1864) 1 Bom. H. C. R. 182; *Pandurang Anandrav v. Bhaskar Shadashiv* (1874) 11 Bom. H. C. Rep. 72; *Udaram Sitaram v. Ranu Panduji* (1875) 11 Bom. H. C. R. 76; *Vasudev Bhat v. Venkatesh Sanbhav* (1873) 10 Bom. H. C. Rep. 139 and *Fakir Apa v. Chanapa* *ibid.* 162.

All these cases were referred to by the Privy

Council in *Suraj Bunsu Koer v. Sheo Persad Singh* I. L. R. 5, Cal. 148 as establishing the uniform practice followed in Bombay. In *Vasudev Bhat v. Venkatesh*, Westropp, C.J., is reported to have* said: "On the principle *Stare decisis*, which induced Sir Barnes Peacock and his colleagues strictly to adhere to the anti-alienation doctrine of the Mitakshara in the Provinces subject to their jurisdiction where the authority of that treatise prevails, we at this side of India find ourselves compelled to depart from that doctrine, so far as it denies the right of a Hindu parcener, for valuable consideration, to sell, incumber, or otherwise alien his share in undivided family property.... Were we to hold otherwise, we should undermine many titles, which rest upon the course of decision, that, for a long period of time, the Courts at this side of India have steadily taken. Stability of decision' is, in our estimation, of far greater importance than a deviation from the special doctrine of the Mitakshara upon the right of alienation."

The case of *Rangayana Shrinivasappa v. Ganapabhatta* (1891), I. L. R. 15, Bom., 673 was one of mortgage by a coparcener and the mortgage was held good in respect of the coparcener's interest after his death.

Law as to
mortgage in
Bombay.

The Madras cases which may be referred to as establishing the practice of one undivided coparcener validly alienating by mortgage or conveyance his interest in joint ancestral property are *Virasvami Gramini v. Ayyasvami Gramini* (1863) 1 Mad. H. C. R. 471; *Peddammuthulaty v. Timma Reddy* (1864) 2 Mad. H. C. R. 270; *Palani-velappa Kaundan v. Mannaru Naikan* (1865) 2 Mad. H. C. R. 416; *J. Rayacharlu v. J. V. Venkataramaniah* (1868) 4 Mad. H. C. R. 60.

The case in 1 Mad. H. C. Reports is considered the leading case on the point in Madras.

As to gifts
and devises.

As to gifts and devises, the Madras Court at one time held that they were valid even in respect of an undivided coparcener's interest (see the case of Vencatapathy *v.* Luchmee 6 Mad. Jurist p. 215). Probably this was the case which Sir James Colville had in view when his Lordship in Suraj Bunsî's case said: "The Madras Courts seem to have gone so far as to recognize an alienation by gift." But later decisions show that gifts as well as devises are held invalid, see *Baba v. Timma* (1883) I. L. R. 7 Mad. 357; *Ponnusami v. Thatha* (1886) I. L. R. 9 Mad. 273; *Ramanna v. Venkata* (1888) I. L. R. 11 Mad. 246; *Virayya v. Hanumanta* (1890) I. L. R. 14 Madras 459 and *Rathnam v. Siva Subramania* (1892) I. L. R. 16 Mad. 353. In *Vitla Butten v. Yanienamma* (1874) 8 Mad. II. C. Rep. p. 6, it was held that a devise by an undivided coparcener of his interest was invalid. This judgment was approved by the Privy Council in *Lakshman Dadanaik v. Ram Chandra Dadanaik* (1880) I. L. R. 5 Bom. 48; I. R. 7 I. A. 181, 7 C. L. R. 320.

In Bombay the law as to gifts and devises is the same as in Madras. *Vide* Vrandavan Das Ram Das *v.* Yamuna Bai 12 Bom. H. C. Rep. 229 referred to by the P. C. in Suraj Bunsî's case. See also *Lakshmishankur v. Vaijanath* (1881) I. L. R. 6 Bom. 24.

Law of
compulsory
sale of an
undivided
coparce-
ner's inter-
est every-
where the
same.

But though the law as to voluntary alienation of coparcenary interest by a single member is not the same in all the Provinces, that as to compulsory alienation has always been the same *viz.*, that the undivided interest of a member may be attached and sold in execution of decree. Indeed Sir Barnes Peacock, C. J., in delivering the judgment of the Full Court in Sadabart Prasad's case

referring to the question as to whether an undivided interest of a coparcener could be seized and sold in execution of decree, said: "It is unnecessary for us to decide whether, under a decree against Bhugwan, in his lifetime, his share of the property might have been seized, for that case has not arisen. According to a decision in Stokes' Reports, it might have been seized."

In *Deendyal Lal v. Jugdeep Narain Sing* (1877) I. L. R. 3 Cal. 198; L.R. 4, I. A. 247; 1 C.L.R. 49, which is the leading case on the subject of sales of the interest of an undivided coparcener in execution of decree, Sir James Colville, after expressing his opinion as to voluntary sales observed: "But however nice the distinction between the rights of a purchaser under a voluntary conveyance and those of a purchaser under an execution sale may be, it is clear that a distinction may, and in some cases does, exist between them. It is sufficient to instance the seizure and sale of a share in a trading partnership at the suit of a separate creditor of one of the partners. The partner could not himself have sold his share so as to introduce a stranger into the firm without the consent of his co-partners, but the purchaser at the execution sale acquires the interest sold, with the right to have the partnership accounts taken in order to ascertain and realize its value.

"It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate; and that it may be so applied without unduly interfering with the particular *status* and rights of the coparceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded, before the alienation of his share took place." Their Lordships added .

that on this point they saw no distinction between a sale in execution of a simple money decree and a sale in execution of a mortgage decree.

In *Suraj Bunsu Koer v. Sheo Persad Sing* (1878) I.L.R. 5 Cal. 148, see p. 167 their Lordships referring to the question of execution sales of the undivided interest of single members said—"That question must now be taken to have been set at rest by the recent decision of this tribunal in *Deendyal Lal v. Jugdeep Narain Sing*, by which the law has so far been assimilated to that prevailing in Madras and Bombay, that it has been ruled that the purchaser of undivided property at an execution sale *during the life of the debtor* for his separate debt, does acquire his share in such property with the power of ascertaining and realizing it by a partition."

Right of
purchaser
to partition.

The purchaser of the rights of an individual member must sue for partition of the whole family-property, making all the parties interested, parties to the suit. He cannot sue for partial partition of only the property in which he is interested; *vide Radha Churn Dass v. Kripa Sindhu Dass* (1879) 4 C. L. R. 428; I. L. R. 5 Cal. p. 474. For, in such a case he merely acquires the right of one coparcener to demand a partition.*

What is the
point of
time which
determines
the share
of the
purchaser.

Another question that frequently arises is, what is the point of time in reference to which the division is to be made, whether the state of the family at the date of the purchase or that at the date of actual partition is to be considered in effecting the partition. The authorities are unanimous in holding that the state of the family at the actual separation is to determine the shares.

* *Vide* the cases of *Chinna Sanyasi v. Suriya* 1882 I. L. R. 5, Mad. 196. *Venkatarama v. Meera Labai* 1889 I. L. R. 13 Mad. 275; *Hasmat Rai v. Sunder Das* 1885 I. L. R. 11 Cal. 396 and *Pandurang Anandray v. Bhaskar Shadashia* (1874) 11 Bom. H.C. Rep. 72.

See *Rangasami v. Krishnayyan* (1890) I. L. R. 14, Mad. 408 and the cases therein cited, also, *Hardi Narain Sahu v. Ruder Perakash Misser* (1883) I. L. R. 10, Cal. 626; L. R. 11, I. A. 26.

(2.) Before considering the effect of alienation of entire coparcenary interest at the instance of a single coparcener it should be observed that the whole body of coparceners can jointly convey a valid title by gift, mortgage or sale. In such cases the purchaser, mortgagee or donee need not make any enquiry as to the existence of legal necessity, and the transfer would hold good for whatever purposes it may be made. The after-born coparceners would not be competent to question the validity of the transfer.

Alienation by the whole body of coparceners.

If any of the members be minor, he may be represented by the managing member of the family, and in that case the alienation must be for the benefit of the minor.

When some coparceners are minors.

In the earliest times, of which we have any record, transfer of any kind was unknown. As time advanced, the first concession made to an owner of property to exercise his power of transfer was by declaring him competent to make gifts to pious Brahmins for pious purposes, and the practice of transferring property by sale gradually grew up in more recent times. Wills are unknown to the Hindu law, and it is only in modern times that following the practice of Western nations, Hindus have commenced to execute wills. The law with regard to wills is mainly the Hindu law of gifts. Mortgages have been known to the Hindus from the ancient times. So the various kinds of transfer contemplated by our early lawgivers are sales, gifts and mortgages, and we find that all of them are provided for in *Mitak.* ch. I, sec. I, para. 28, which forms the groundwork of all the law on the subject.

Growth of power of alienation.

Vijnaneswara explains this para. in these words :—"While the sons and grandsons are minors and incapable of giving their consent to a gift and the like; or while brothers are so and continue unseparated, even one person, who is capable, may conclude a gift, hypothecation or sale of immovable property, if a calamity affecting the whole family require it, or the support of the family render it necessary or indispensable duties, such as, the obsequies of the father or the like, make it unavoidable." This commentary contemplates both classes of families; those in which the father is the managing member, as well as those in which an elder brother or any other coparcener is the manager. The force of the word "even" in "even one person" is clearly to counteract the earlier injunction in para. 27 that the sale, gift or mortgage should be made by the father upon convening all the sons.

Legal necessity.

The purposes for which the entire coparcenary interest may be transferred are technically termed "legal necessity." To us in modern times, though sales and mortgages seem necessary in the management of the family affairs, gifts appear as incapable of being turned into any useful purpose. But as to gifts of land, the *Brahma Vaidarta Purana* says "Both he who accepts lands and he who gives it are performers of a holy deed and shall go to a region of bliss." See *Raghunath Prasad v. Gobind Prasad* (1885) I. L. R. 8, All. 76.

Circumstances in which one coparcener can alienate family-property

We have seen that, confining ourselves to the texts (and they are paras. 28 and 29, sec. I, ch. I of the *Mitak.*) the only instance where one person can alienate coparcenary property belonging to himself and others is, where the other coparceners are minors and therefore "incapable of giving their

consent to a gift and the like." As regards adult members the texts suggest that they must either join in the alienation or give their consent to it. Now, consent may be given either by express words or by implication. Thus, when the adult members of a family constitute one of themselves as manager to transact the family affairs, it is only natural and reasonable to infer the consent of them all to whatever the managing member does. In such circumstances the liability of the adults would be more complete than that of the minor members. For, whereas a minor cannot be bound by a managing member's acts unless done with the object of benefiting such minor, or, a number of persons of whom the minor is one, an adult member would be bound by such acts unless they were done in excess of the powers conferred, expressly or impliedly, on the managing member. If the acts are for the benefit of an adult his consent would be implied. But in other cases too, where his consent can *reasonably* be implied, he would be bound. Thus in *Miller v. Runganath Moulick* (1885) 1. L. R. 12, Cal. 389, Justice Mitter after considering various cases said : " The result of these cases, in our opinion, is that an alienation, made by a managing member of a joint family, cannot be binding upon his adult co-sharers unless it is shewn that it was made with their consent, either expressed or implied. In cases of implied consent, it is not necessary to prove its existence with reference to a particular instance of alienation. A general consent of this nature may be deducible in cases of urgent necessity, from the very fact of the manager being entrusted with the management of the family estate by the other members of the family. The latter, in entrusting the management of the family affairs to the hands of the manager must be presumed to

When
other co-
parceners
are minors.

When they
are adults.

Implied
consent of
adult copar-
ceners.

have delegated to the said manager the power of pledging the family credit or estate, where it is impossible or extremely inconvenient for the purpose of an efficient management of the estate to consult them, and obtain their consent before pledging such credit or estate." It may be said that this was a case under the Dayabhaga law, according to which the members of a joint family have their shares defined even before partition, and under which the principles of survivorship have no place except in the case of some female heirs. But if the principles I have above enunciated apply to a Dayabhaga family, *a fortiori* they apply to a Mitakshara family. In *Chhotiram v. Narayan Das* (1887) 1. L. R. 11, Bom. 605, Sargent, C.J., after considering the above observations of Justice Mitter in *Miller v. Runga Nath* 1. L. R. 12, Cal. 389, and the remarks of the same learned Judge in *Upooroop Tewary v. Lalla Bandhjee Suhay* (1881) 1. L. R., 6 Cal. p. 749; 8 C. L. R., 192 said: "This leaves the question to depend mainly upon the urgency of the necessity and the inconvenience in obtaining the consent of the adult members"; and again, "These authorities show that no hard and fast rule can be laid down, but that in each case the conclusion as to consent of the adult member must depend upon its own special circumstances."

Let us now consider some cases of necessity which under the law would authorize the managing member to alienate ancestral immovable property.

Sale to avert calamity.

The commentaries provide that a sale of ancestral property may be effected to avert a calamity affecting the whole family. Suppose, a father, on account of a debt which is not legally payable by the sons, and which therefore cannot be realized from the ancestral property, is in the immi-

ment danger of being taken to jail. The incarceration of the father would be a calamity affecting the whole family, and I think a sale of ancestral property to prevent the calamity would be allowable in the special circumstances of the case. See *Duleep Singh v. Sreekishoon Pandey* (1872) 4 N.-W. 83.

Similarly it is the indispensable duty of a father to provide a suitable bridegroom for his daughter, and after the father's death the duty devolves upon the brothers. Now the expenses of a marriage in these days are proverbially enormous and sales of ancestral property are generally made to meet such expenses. Such sales would be justifiable on the ground of necessity.

To provide husband for daughter and sister.

Obsequies of the father and of the grandfather must be performed on a scale suitable to the position of the sons and grandsons, and for the defraying of such expenses, the law authorizes a single member to sell a portion of ancestral property during the minority of the other coparceners.

Obsequies of father.

A sale of ancestral property may also be needed for the maintenance of the family. In several families, their incomes from all sources are just sufficient to enable them to live from hand to mouth in ordinary years. In years of famine, therefore when the prices of food-grains rise considerably high, the managing members are obliged to sell portions of ancestral property to defray the expenses of maintenance.

Maintenance of family.

Then again, expenses have to be incurred for the preservation of properties. Thus a portion of ancestral property may have to be sold in order to meet the expenses of repairing a dilapidated building which yields a large income. So also, as you know, Government revenue has to be paid for certain kinds of property, and unless it is punctually paid the properties are brought

Preservation of properties.

under the hammer. A family possessed of such revenue-paying properties may find it necessary in its own interest to part with a portion of its ancestral property in order to protect from sale its revenue-paying properties (See *Maheshpertap Singh v. Ramghurreed Chowbee* (1857) (Sel. Reports N.-W. P., 173; 1 Ratt. Rep. 239).

Payment of debts due from father or grandfather.

These are some of the many legal necessities for which a managing member may justly alienate any portion of ancestral property by mortgage or sale. But by far the largest number of such necessities owe their origin to those precepts of Hindu law, which declare the payment of a father's and grandfather's debts, save such as are of an immoral nature, to be a pious duty of his sons and grandsons.

At one time it was a question, whether the obligation of the sons and grandsons existed while the father or grandfather was alive, but now it is settled that even when the father or grandfather is alive, it is the pious duty of the sons and grandsons to pay the debts. The result is that for the father's debts, the father, sons and grandsons—all the coparceners—are liable and the family-property consequently may be used to meet these debts.

Texts providing for payment of debts generally.

As by far the largest number of alienations of ancestral property are sought to be justified on the ground of the sons' liability to pay their father's debts, let us at the risk of a digression pause here to consider the texts and case-law on the subject.

Vishnu.

Vishnu VI, " 27. If he who contracted the debt should die or become a religious ascetic or remain abroad for 20 years, that debt shall be discharged by the sons or grandsons.

" 28. But not by remoter descendants against their will.

"29. He who takes the assets of a man, having or not having such issue, must pay the sum due by him.

"33. Nor (should) a father (be compelled) to pay the debt of his son.

"39. And so must he (the householder) pay that debt which was contracted by any person for the behoof of the family."

Narada I, "2. The father being dead it is incumbent on the sons to pay his debt, each according to his share of the inheritance, in case they are divided in interests, or if they are not divided in interests the debt must be discharged by that son who becomes manager of the family estate. Narada.

"3. That debt which has been contracted by an undivided paternal uncle, brother or mother, for the benefit of the household must be discharged wholly by the heirs.

"4. If a debt has been legitimately inherited by the sons and left unpaid by them, such debt of the grandfather must be discharged by his grandsons. The liability for it does not include the fourth in descent.

"5. Fathers wish to have sons on their own account thinking in their minds he will release me from all obligations towards superior and inferior being.

"10. A father must not pay the debt of his son but a son must pay a debt contracted by his father excepting those debts which have been contracted from love, anger, for spirituous liquor, games or bailments.

"11. Such debts of a son as have been contracted by him by his father's order or for the maintenance of the family or in a precarious situation must be paid by the father.

"15. Every single coparcener is liable for the debts contracted by another coparcener if they

were contracted while the coparceners were alive and unseparated. But after their death the son of one is not bound to pay the debt of another."

Brihaspati.

Brihaspati XI, "47. A loan shall be restored on demand if no time has been fixed for its restoration, or on the expiration of the time (if a definite period has been fixed): or when interest ceases on becoming equal to the principal. If the father is no longer alive the debt must be paid by his sons.

"48. The father's debt must be paid first of all, and after that a man's own debt; but a debt contracted by the paternal grandfather must always be paid before these two even.

"49. That the father's debt on being proved must be paid by the sons as if it were their own; the grandfather's debt must be paid by his son's sons without interest; but the son of a grandson need not pay it at all:

"50. When a debt has been incurred for the benefit of the household by an uncle, brother, son, wife, slave, pupil or dependant it must be paid by the family.

"51. Sons shall not be made to pay a debt incurred by their father for spirituous liquor, for losses at play, for idle gifts, for promises made under the influence of love or wrath or for suretyship nor the balance of a fine or toll (liquidated in part by their father)."

Yajñavalkya.

Mitakshara Vyavaharadhyay ch. VI, sec. III, para. 5, "That the debt shall be paid by the son and the grandson will be expounded hereafter. But the exceptions are declared beforehand 'A son is not bound to pay, in this world, his father's debts if they are incurred for the spirituous liquor or for gratification of lust or in gambling, nor is he bound to pay any unpaid fines or tolls; or idle gifts.'"

Para. 13. "Again the author resumes the three subjects *viz.*, what debt should be paid, by whom they are to be paid and when. "If a father has gone abroad or died or is subdued by calamity, his debt shall be paid by his sons and grandsons; on their denial the debt must be proved by witnesses."

14. "If the father, without paying a debt which is due, dies or goes to a distant country or is afflicted with an incurable disease, &c., then his debt must be paid by his son and grandson by reason of their sonship and grandsonship, even if no assets of the father or of the grandfather have been left." * * *

From these texts it was at one time inferred, that so long as the father was alive, he was bound to pay his own debts, and that the obligation of the son to pay his father's debts arose upon the death of the father. But if we carefully read the texts together, we ought to infer that though so long as the father is alive, he is bound to pay his debts, the obligation of the sons to pay them during the same time is none the less. Narada states the periods when debts of different kinds become due; and the law that the father's debts should be paid at the father's death implies that even if the debts be not due at the father's death, whenever that event may happen, they must be then paid; for, otherwise according to Hindu ideas, the father would be consigned to hell. To conclude that a son is not bound to pay his father's debts during the latter's lifetime would be inconsistent with the texts which declare that a father longs for a son because such son would release him from all obligations. I have not seen this construction adopted by any of the writers, but I venture to give the texts this interpretation because of the total absence of any injunction not

Whether sons are bound to pay their father's debts during his lifetime.

to pay these debts during the father's lifetime. If the Rishis had any such idea they would not have failed to give expression to it, as they have done when they did not wish that the father should be under any obligation to pay his son's debts. Besides, it is no argument against this present construction to say that a father should pay his own debts. There is nothing absurd in the injunction that two persons should be primarily liable for the same debt.

Father's debts have to be paid whether the family is benefited or not.

I have quoted above, not only the texts which bear on the question of father's debts, but also texts which treat of debts contracted by other persons, to show the distinction made between them by our holy legislators. Father's debts have to be paid whether the family is benefited by them or not, but the case is otherwise with the debts contracted by* other members of the family. It is only those debts which the father incurs for spirituous liquor &c. that the son is not bound to pay.

Let us now examine the case-law on the subject.

1. In *Hunooman Persaud Pandey v. Munraj Koonwerce* (1856) 6 M. I. A., 393; 18 W. R. 81 note, Lord Justice Knight Bruce is reported to have said: "Though an estate be ancestral, it may be charged for some purposes against the heir, for the father's debt, by the father, as, indeed, the case above cited from the 6th volume of the decisions of the Sudder Dewany Adalut N.-W. P. incidentally shows. Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it, even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu law, the freedom of the son from the obligation to discharge the father's

* Ante p. 128. Brihaspati XI. 50.

debt, has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt."

2. In *Junnuk Kishore Koonwar v. Roghoo Nundun Sing*, Bengal Sudder Dewany Adalat Reports of 1861 it is said (p. 222): "Freedom on the part of the son, so far as regards ancestral property from the obligation to discharge the father's debts under Hindu law, can be successfully pleaded only by a consideration of the invalid nature of the debts incurred."

3. In *Muddun Thakoor v. Kahtoo Lall*, and in *Gridharee Lall v. Kahtoo Lall* and others (1874) 22 W. R., 56; 14 B. L. R., 187; L. R., 1, I. A. 321, Sir James Colville quoted with approbation from *Hunooman Persaud Pandey v. Mussamat Babooee Munraj Koonweree* (6 M. I. A. 393) and said: "That is an authority to show that ancestral property, which descends to a father under the Mitakshara law, is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts, the ancestral property in which the son, as the son of his father, acquires an interest by birth, is liable to the father's debts."

This case has been followed by a long series of cases. Under the authorities, the whole of the ancestral properties in the hands of the sons and grandsons, would be liable for such debts. Chief Justice Westropp in the case of *Udaram Sitaram Ranu v. Pandujit* (1875) 11 Bom. H. C. Rep., 76 is reported to have said: "Subject to certain limited exceptions, as for instance, debts contracted for immoral or illegal purposes, the whole of the family undivided estate would be, when in the hands of the sons or grandsons, liable to the

The whole ancestral property is liable for the father's debts during his lifetime.

debts of the father and grandfather. Accordingly when ancestral property has passed out of the family either under a conveyance executed by the father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the latter's debt, his sons by reason of their duty to pay their father's debts cannot recover that property, unless they show that the debts were of a kind for which they would not have been liable, and that the purchasers had notice to that effect; and a purchaser at an execution sale being a stranger to the suit without such notice is not bound to make enquiry beyond what appears on the surface of the proceedings." This observation of the Chief Justice was quoted with approbation by their Lordships of the Privy Council in *Suraj Bansi Koer v. Sheo Persad Sing* (1878) I. L. R. 5, Cal. p. 148 (169); I. R. 6, I. A., 88; 4 C. L. R., 226.

At one time the obligation of the son to pay his father's debts was held not to arise until after the father's death. But in *Muddun Thakoor v. Kantoo Lall* already referred to, their Lordships of the Privy Council held that ancestral property was liable even during the father's lifetime.

In *Laljee Sahoy v. Fakeer Chand* (1880) I. L. R. 6, Cal. p. 135; 7, C. L. R., 97, Justice Pontifex observed: "No doubt, previously to the Privy Council judgment, it was considered that the pious duty of paying the father's debts did not arise until after his decease. This resulted from what appears to have been considered by the Privy Council a too literal interpretation of the texts which applied to the subject, and which for convenience' sake, may be referred to as to a great extent collected in ch. V, sec. IV of the *Mayukha*. But by the decisions of the

Privy Council it has now been established, 'that it is a pious duty of the son to pay his father's debts out of the ancestral estate even in the father's lifetime.' To the same effect are the observations of Justice Pigot in *Khalilul Rahman v. Gobind Pershad* (1892) I. L. R. 20, Cal. p. 328. That learned judge observed: "It is also now established that a decree for the personal debt of the father, not illegal or immoral, may be enforced by sale in execution in his lifetime of the entire joint family estate.—*Meenakshi Naidu v. Immudi Kanaka* (I. L. R. 16, I. A. 1; I. L. R. 12, Mad. 142. This is one of the advances lately made on the older law, which made the son's shares liable in respect of the pious duty to pay the father's debts, after his natural or civil death."

The result is that a valid alienation of ancestral property may be effected by the managing member whenever it may be necessary to raise money in order to avert a calamity affecting the whole family, to meet the expenses of maintenance, to provide suitable bridegrooms for daughters or sisters, to perform *shrads*, to pay ancestor's debts save such as are immoral, &c. &c.

In this connection it should be observed that it is not always easy to alienate only such portion of the ancestral property as is *just* sufficient for a necessity. Accordingly in *Luchmeedhur Singh v. Ekbal Ali* (1867) 8 W. R., 75 it was held that the rule that only so much of the property should be sold as would meet the necessity did not apply to cases where the excess was small, or, where the money really required could not be otherwise raised.

Only such portion to be alienated as is absolutely necessary.

But though a managing member is competent to mortgage, sell or even to give away coparcenary property in the interest of the family, it is not within his power to dispose of any property .

Powers of managers.

for any other purpose. The other members of the family have a right to see that family-property is not frittered away at the whims of the manager and accordingly they have a right to question the title of the mortgagee, purchaser, or, donee when he derives his title from the managing member. Hence arises the necessity of considering the powers of managers.

Hunooman Persaud Pandey's case applied to cases of sales by managing members in Mitakshara families.

The leading case on this subject is that of *Hunooman Persaud Pandey v. Mussamat Babooee Munraj Koonweree* 6 M.L.A., 393. That was the case of a mother acting as guardian of her infant son. But the observations made in the case by their Lordships of the Privy Council have been held applicable to all cases of management under the Mitakshara Law *vide* *Soorendro Pershad Dobey v. Nundun Misser* (1874) 21 W. R., 196; *Tandavaraya Mudali v. Valli Ammal* (1863) 1 Mad. H. C. Rep., 398; and *Bemola Dossee v. Mohun Dossee* (1880) 1 L. R. 5, Cal. 792; 6 C. L. R. 34, where Justice Wilson is reported to have said: "It follows, I think, upon principle that the managing members of the family must have the same power to pledge the credit or property of the family, for the maintenance of the business as for the preservation of any other piece of property, that is to say, they must be able to do so when a sufficient case of necessity for the benefit of the estate arises; *Hunooman Persaud Pandey v. Babooee Munraj Koonwaree* and the authorities there cited are to the same effect."

Hunooman Persaud Pandey's case

Allow me now to read to you certain passages from the judgment of Lord Justice Knight Bruce in the case of *Hunooman Persaud Pandey*. "The power of the manager for an infant heir to charge an estate not his own, is, under the Hindu law, a limited and qualified power. It can only be exercised rightly in a case of need or for the bene-

fit of the estate. But where in the particular instance the charge is one that a prudent owner could make in order to benefit the estate, the *bona fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor, against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted *mala fide*, will not be affected, though it be shown that, with better management, the estate might have been kept free from debt. Their Lordships think that the lender is bound to enquire into the necessities for the loan, and to satisfy himself, as well as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that, if he does so enquire, and acts honestly, the real existence of an alleged sufficient and reasonably-credited necessity is not a condition precedent to the validity of his charge, and they do not think that, under such circumstances, he is bound to see to the application of the money. It is obvious that money to be secured on any estate is likely to be obtained on easier terms than a loan which rests on mere personal security, and that, therefore, the mere creation of a charge securing a proper debt can not be viewed as improvident management; the purposes for which a loan is wanted are often future, as respects the actual application, and a lender can rarely have, unless he enters on the

Enquiry
into neces-
sity by
lender.

De facto
manager to
be held
rightful
manager.

management, the means of controlling and rightly directing the actual application. Their Lordships do not think that a *bona fide* creditor should suffer when he has acted honestly and with due caution, but is himself deceived." One of the contentions in the case was, that the manager was not rightly appointed, and that the mortgagee, therefore, did not acquire a valid title by his mortgage from the *de facto* but not *de jure* manager. Their Lordships referring to this contention said: "Upon the third point, it is to be observed that, under the Hindu law, the right of a *bona fide* incumbrancer who has taken from a *de facto* manager a charge on lands created honestly, for the purpose of saving the estate, or for the benefit of the estate, is not (provided the circumstances would support the charge had it emanated from a *de facto* and *de jure* manager) affected by the want of union of the *de facto* with the *de jure* title."

This case has been the leading case on all the above mentioned points for 40 years. It requires the purchaser or the mortgagee to establish the factum of the necessity for which the sale or the mortgage is effected. It requires him to prove the factum of the advance of money, either as loan or consideration for the purchase. If he was deceived as to the actual existence of the necessity, it requires him to show that he made *bona fide* enquiry on the point and was satisfied of the existence of the necessity. It does not require him to enquire if the necessity might have been avoided, or prevented from arising, by better management. It does not require him to look to the application of the money paid by him to the avowed object for which the sale or the mortgage is sought.

In this connection it is important to note the provisions of sec. 38 of the Transfer of Property

Act. The section simply embodies, in a concise form the result of the rulings that we have just discussed, and though the Act itself is not in force in several parts of India, the principle contained in the section applies everywhere. It runs thus : "Where any person, authorized only under circumstances in their nature variable to dispose of immovable property, transfers such property for consideration, alleging the existence of such circumstances, they shall, as between the transferee on the one part and the transferor and other persons (if any) affected by the transfer, on the other part, be deemed to have existed, if the transferee, after using reasonable care to ascertain the existence of such circumstances, has acted in good faith.

**Transfer
of Property
Act.**

Illustration. A, a Hindu widow, whose husband has left collateral heirs, alleging that the property held by her as such is insufficient for her maintenance, agrees, for purposes neither religious nor charitable, to sell a field, part of such property, to B. B satisfies himself by reasonable inquiry that the income of the property is insufficient for A's maintenance, and that the sale of the field is necessary, and, acting in good faith, buys the field from A. As between B on the one part and A and the collateral heirs on the other part, a necessity for the sale shall be deemed to have existed."

**Illustration.
A, a Hindu
widow &c.**

In cases of mortgage, gift and private sale, the instruments executed are often precise in their terms, as to the property intended to be mortgaged, given, or sold. Indeed, under the Hindu law, as you have elsewhere learnt, a gift cannot be complete without the donee being put into possession of the property. No question, therefore, arises in such cases as to whether the mortgagee, purchaser or donee intended to bargain for the entire coparcenary interest, or a fractional part thereof.

**Voluntary
alienations
of family-
property.**

Of course, it would be open to the members

What has the purchaser to prove when his purchase is questioned.

other than the executants to question the *bona fides* of the mortgages, sales or gifts, but in these cases the mortgagees, purchasers, or donees must prove the factum of the mortgages, sales, or gifts, as well as the existence of legal necessity, or, if they were deceived as to the real necessity, that they made reasonable enquiry and were satisfied upon such enquiry of the existence of the alleged necessity.

Onus to prove character of debts.

When a mortgage or a sale of an entire family-property is effected by the managing member in order to pay off an antecedent debt of the father, (and you must remember that the father himself as the managing member can also do this), a question frequently arises as to who has to prove the character of the debts,—whether the sons seeking to avoid the alienation have to show that the debts were of an immoral nature, or, the alienee, that they were not so. It is now settled by a long course of decisions that the person impeaching the debt has to show that it was immoral, and in the absence of any evidence on the point, the debt must be presumed to be of a character binding on the heirs. In *Hunooman Persaud Pandey v. Mussamat Babooee Munraj Koonweree* (1856) 6 M. L. A., 393; 18 W. R., 81 note, Lord Justice Knight Bruce, referring to a *dictum* of the judge of the Sudder Dewany Adalat in *Oomed Rai v. Heera Lall* (6 S. D. A. Rep. N.-W. P., 218) that the onus was on the sons, said: "It might be a very correct course to adopt with reference to suits of that particular character, which was one where the sons of a living father were, with his suspected collusion, attempting, in a suit against a creditor, to get rid of the charge on an ancestral estate created by the father, on the ground of the alleged misconduct of the father in extravagant waste of the estate.

Now, it is to be observed that a lender of money may reasonably be expected to prove the circumstances connected with his own particular loan, but cannot reasonably be expected to know, or to come prepared with proof of the antecedent economy and good conduct of the owner of an ancestral estate; whilst the antecedents of their father's career would be more likely to be in the knowledge of the sons, members of the same family, than of a stranger; consequently this *dietum* may perhaps be supported in the general principle that the allegation and proof of facts, presumably in his better knowledge, is to be looked for from the party who possesses that better knowledge, as well as on the obvious ground in such suits of the danger of collusion between father and sons in fraud of the creditor of the former. But this case is of a description wholly different, and the *dictum* does not profess to be a general one, nor is it so to be regarded." In *Suraj Bunsu Koer v. Sheo Persad Singh* (1878) I. L. R. 5, Cal. 148 (171); 4 C. L. R., 226; I. R. 6, I. A., 88, Sir James Colville observed: "Where ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt, or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, his sons by reason of their duty to pay their father's debts cannot recover that property unless they show that the debts were contracted for immoral purposes."

To the same effect see *Bhagbut Pershad Singh v. Girja Koer* (1838) I. L. R. 15, Cal. 717; *Mahabir Pershad v. Moheswar Nath Sahai* (1889) I. L. R. 17, Cal. 584; *Beni Madho v. Basdeo Patak* (1890) I. L. R. 12, All. 99.

It would appear that in all these cases it was

the son who was the plaintiff ; but I think that in suits by purchasers against the joint family for possession of family-property on the allegation that the father or other managing member sold the property for payment of an antecedent debt, they would in the first instance have only to prove the existence of the previous debt or of a decree for such debt. It should then be presumed that the debt was a proper debt, and that it bound the ancestral property. Such a presumption, rebuttable though it be, would be perfectly in accordance with the rules of evidence. Debts are, as a rule, such as bind the son's estate ; while those that are of an immoral nature are merely exceptions. And as you know from the rules of evidence, the person who seeks advantage of an exception has to prove the circumstances which entitle him to the advantage. See *Chintamanrav Mehendale v. Kashinath* (1889) I. L. R. 14, Bom. 320. In this last case the onus was placed on the defendant to show that the debt was of an immoral nature.

Sons to
prove pur-
chaser's
knowledge
of debts
being for
immoral
purposes.

I have said above that the purchaser has simply to prove the existence of the previous debt. The ruling in *Suraj Bansi Koer's* case requires that not only must the debt be shown to have been for immoral purposes but that it must also be shown that the purchaser had notice that it was contracted for such purposes, before a son can succeed in setting aside a sale. To the same effect are the observations of Westropp, C.J., in *Udaram Sitaram v. Ranu Panduji* (1875) 11 Bom. H. C. Rep., 76 and of Justices Birdwood and Parsons in *Krishnaji Lakshman v. Vithal Ravji Renge* (1878) I. L. R. 12, Bom. 625. As the purchaser himself can best say whether he had such notice, it is always advisable for him to give his own evidence on the point, if he wishes to contest the notice.

From what I have now said, you will observe

that a son seeking to avoid a sale by his father for an antecedent debt, or a sale in execution of a decree against his father for such debt, has, besides showing that the antecedent debt was contracted for immoral purposes, also to show that the purchaser had notice that the debt in question was contracted for immoral purposes. Were the law otherwise, an anomaly would be the result; for, whereas a sale of family-property by a father or manager for an alleged legal necessity other than the payment of an antecedent debt would stand if the purchaser were satisfied upon enquiry as to the existence of the necessity even though the necessity might have been false, a sale of the same property for the payment of an alleged valid antecedent debt would be set aside, only because the purchaser was deceived in his enquiry.

This condition, *viz.*, that the debt must be shown to have been immoral to the knowledge of the alienee, has virtually done away with all restraints on the father's powers and left the *bona fide* purchaser from a father for an antecedent debt, in exactly the same position as a purchaser from a father in a family governed by the Dayabhaga law. I presume you know that the father in a Dayabhaga family is the absolute proprietor of all ancestral and self-acquired property, and, that unlike what we see in a Mitakshara family, his sons have no co-ordinate rights with him. A purchaser from such a father, to whatever purposes the purchase money may be applied, acquires an absolute title to his purchased property. So also if a person being satisfied of the existence of an antecedent debt (as to which we shall see presently) of a Mitakshara father, and not being apprised of any circumstances which would make the antecedent debt a debt contracted for immoral purposes, should acquire a title from

Effect of
decision in
Suraj
Bunsi's
case.

the father, he would acquire an indefeasible title. The only difference between the two cases will consist in the circumstance that whereas the Mitakshara son would have a right to put the purchaser's title to test, the Dayabhaga son would have no such right.

Antecedent
debt

In some of the cases which we have considered in this Lecture, the expression "antecedent debt" has been used. Now what is 'an antecedent debt'? It means a debt previous to some transaction or proceeding in a Court of Justice. We have seen that it is the pious duty of sons to pay their father's debts, save those which are incurred for immoral purposes. By the expression "antecedent debt" we mean the debt of the father which has been paid off by a fresh debt, a sale or a mortgage. The last debt or mortgage-debt would not be an "antecedent debt." The prior debt which is wiped off is the antecedent debt. In *Laljee Sahoy v. Fakeer Chand* (1880) 1 L. R. 6, Cal. 135; 7 C. L. R., 97, Pontifex, J., said: "It would seem in consequence of the rulings of the Privy Council, we are bound to hold that the payment, even in the father's lifetime, of an antecedent debt due by him is a pious duty on the part of the son; and its discharge is, therefore, such a necessary purpose as to give validity to a sale or mortgage by the father as against his minor sons (but not against his adult sons) whether such antecedent debt does or does not come within the words—'If a calamity affecting the whole family requires it, or the support of the family renders it necessary, or indispensable duties, such as the obsequies of a father or the like, make it unavoidable;' always provided that the antecedent debt is not incurred for immoral purposes. It was however the opinion of the Full Bench, that the antecedent debt spoken of by the Privy Council means

a debt antecedent to the transaction, *viz.*, the sale or mortgage purporting to deal with the property.

But if the property is dealt with by a decree in a suit upon a mortgage by the father alone, to which suit the father and the sons are parties, it follows from the Privy Council decisions, that as against the sons, even though they may have been adult when the debt (assuming it was not for immoral purposes) was incurred, and notwithstanding V 29, ch. I, sec. I and V 10, sec. VI, of the Mitakshara the property would be bound not indeed by virtue of the mortgage, but by virtue of the father's debt antecedent to the suit being enforceable against the joint ancestral estate, and therefore against the mortgaged property as part of it."

In *Khalilul Rahman v. Gobind Pershad* (1892) 1 L. R. 20, Cal. 328, Pigot, J., on p. 346 after quoting the above observations of Pontifex, J., said: "The result would perhaps seem to be that 'antecedent debt' in the meaning of the Full Bench, means with regard to a mortgage, 'debt antecedent to the transaction', and, in the case of a proceeding by suit 'debt antecedent' to the institution of the suit." Here Pigot, J., was referring to the Full Bench decision in *Luchmun Dass v. Giridhur Chowdhry* (1880) 1 L. R. 5, Cal. 855.

While on the subject of legal necessity, it should be observed that in almost all cases of alienations, the deeds contain recitals of the purpose for which the money was wanted. Now, the law as to recitals in a deed is that they are some evidence that the fact recited was present to the minds of the parties to the transaction, but they are no evidence to establish the facts so recited — *Sikher Chund v. Dulputty Singh* (1879) 1 L. R. 5, Cal. 363; 5 C. L. R., 374. *Sunker Lall v. Juddoobuns Suhaye* (1868) 9 W. R., 285.

It remains for me to consider whether when a

Recitals in deeds no evidence of necessity.

Cases where the alienation would not bind the family-property but would be good against the interest of a coparcener.

purchaser fails to establish the existence of the alleged legal necessity or to show that he made any enquiry on the question of necessity, the sale should fall through *in toto* or should hold good to the extent of the interest of the selling member. The answer to this question depends upon various considerations. If the sale was a voluntary sale and not in execution of decree, then, as we have already seen, the law as adopted in Bengal and the N.-W. Provinces would hold the sale to be bad; whereas the law of the Presidencies of Bombay and Madras would hold the sale good as to the share of the selling coparcener. If, on the other hand, the sale was held in execution of decree, it would be good in respect of the share in all the provinces.

Decree in cases where purchaser is entitled to a coparcener's interest

In cases where the sale of the entire property being set aside, the purchaser is deemed entitled to a member's interest the decree ought to declare that possession should remain with the joint family and the purchaser should be entitled to the interest of the member whose share he has purchased and that such share should be ascertained by partition of the family-property. See *Deen Dyal Lal v. Jugdeep Narain Singh* (1877) I. L. R. 3, Cal. 198; I. R. 4, I. A., 247; 1 C. L. R., 49 (where father's interest was sold); *Rai Narain Dass v. Nownit Lal* (1879) I. L. R. 4, Cal. 809; 4 C. L. R., 67 (where a son's interest was sold); *Pursid Narain Singh v. Honooman Sahay* (1880) I. L. R. 5, Cal. 845; 5 C. L. R., 576. In *Mahabeer Persad v. Ramyad Singh* 12 B. L. R., 90; 20 W. R., 192 Justice Phear in setting aside the sale by a co-sharer on the ground that no legal necessity was proved, declared that the property should be held in defined shares and that the shares of the members who had benefited by the sale should be subject

to the lien of the purchaser. The Privy Council in the case of *Deen Dyal Lal v. Jugdeep Narain Sing* (1877 I. L. R., 3 Cal. 198, determined the mode in which the decree in such cases should be drawn.

So much for private alienation, including mortgage, gift and sale, of ancestral property, by single members on behalf of the family. Let us now consider the law as to compulsory sales of such property in execution of decrees. We know that whatever is capable of being privately alienated is ordinarily saleable in execution of decree, and further that the circumstances which would justify a private alienation would also justify a sale in execution. The law, that we have hitherto considered in respect of private alienation, would therefore, equally apply to sales in execution of decrees. But in cases of sales in execution of decrees there are two disturbing elements. In the first place, the decrees in execution of which the properties are sold are, generally, against some members only of the family, and the question, which therefore frequently arises, is whether the sales conveyed only the interest of the judgment-debtors on the record. In the second place, the sale certificates which are granted to purchasers at such sales are generally vague in their terms, and the proceedings leading up to sale throw no light on the question; they may be construed to convey, either only the interest of the judgment-debtors on the record or the family-property itself. Let us consider both these points in the order in which they have been here stated.

Sale in execution decree.

1. Whether the sales convey only the interest of the judgment-debtors on the record.

Whether the interest of judgment-debtors only pass.

At one time the law on this point was unsettled, that is, while some decisions held that the names

Conflicting decisions.

of the debtors on the record were the index as to what passed, others held that the purchaser might go behind the names and show that the original debt was binding on the family.

Thus in *Subramaniyayyan v. Subramaniyayyan* (1879) 1. L. R., 5 Mad. p. 125, Justice Innes, in delivering the judgment of the Full Bench, is reported to have said: "It would be strange and novel to find that a decree, by reason of the terms in which it was drawn up, to the effect that the *property* should be sold, could affect the interests of parties other than those made liable by the decree. But it was argued before us that we should look not to the decree or to the capacity in which first defendant was sued, but to the nature of the transaction. If the debt was incurred for family purposes, and one who is the managing member was sued personally upon the obligation, all the members of the family, it was said, are liable.

"But if *Saminadhayyan* elected to enforce his remedy against first defendant alone, plaintiff was not bound to come forward and ask to be made a party and to be allowed to take part in the liability upon the bond. The decree being a decree against first defendant alone, all that passed by the sale in execution was the interest of first defendant." In *Pursid Narain Sing v. Honooman Sahay* (1880) 1. L. R., 5 Cal. 845; 5 C. L. R., 576, *Pontifex, J.*, said: "We find no authority for saying that a judgment-creditor of the father in respect of the father's own separate debt, can, either in the father's lifetime, or afterwards, attach or take any specific portion of the ancestral property beyond the father's own proportionate right in it, without having made the other members of the family parties to his suit. The case of *Deendyal Lal v.*

Jugdeep Narain Sing is an authority of the Privy Council for holding, in a case where no necessity is shown to have existed, that execution-proceedings by a judgment-creditor on a bond given by a Mitakshara father against property not hypothecated by the bond, and when the father alone had been made a defendant to the suit, cannot affect the interests of the other co-sharers of the family. Indeed, if it were otherwise, there would be an end virtually of the Mitakshara family, for a father would only have to borrow for purposes not immoral and submit to a decree, and the family might, in execution of that decree, be deprived of the most cherished portion of the ancestral property without any opportunity of redeeming it." In *Abilak Roy v. Rubbi Roy* (1885) I. L. R. 11 Cal. 293, Mitter and Field J. J., followed the above judgment and in noticing its effect observed "that in a case where the elder brother acting as a manager, executes a mortgage bond, if a decree be obtained against the executant of the bond and not against his other brothers as well, the interest of the brothers who are not parties to the suit would not be affected by the decree and the execution sale, although the mortgage itself might be binding on them."

The principles of the above decisions were adopted in *Dorasami Vajappayyar v. Atiratra Dikshatar* (1883) I. L. R. 7, Mad. 136. In *Deendyal Lal v. Jugdeep Narain Singh* (1877) I. L. R. 3, Cal. 198, Sir James Colville said: "whatever may have been the nature of the debt, the appellant can not be taken to have acquired by the execution sale more than the right, title, and interest of the judgment-debtor. If he had sought to go further, and to enforce his debt against the whole property and the co-sharers therein who were no parties to the bond, he ought to have framed his

suit accordingly and have made those co-sharers parties to it." His Lordship referred to the cases of *Nugender Chunder Ghose v. Kamince Dossee* 11 M. I. A. 241; and *Baijun Doobey v. Brij Bhookun Lall Awasti* (1875) I. L. R. 1 Cal. 133; 24 W. R. 306; I. R. 2, I. A. 275. To the same effect see *Hardi Narain Sahu v. Ruder Perkash Misser* (1883) I. L. R. 10, Cal. 626; I. R. 11, I. A. 26. These decisions would seem to lay down that only the interest of the debtor as named in the decree would pass to the purchaser at a sale in execution and that it was not open to the Court in a regular suit to go behind the decree to see what might have passed.

But, side by side with these decisions, there were others in which the Courts went behind the decrees and held that not only did the interest of the parties on the record pass, but the entire interest of the family was purchased by the purchaser. In *Bissessur Lall Sahoo v. Luchmessur Sing*, (1879) I. L. R. 6, I. A. 233; 5 C. I. R. 477, the purchaser was held to have purchased the entire interest of the family notwithstanding that the decree was against one of the several members of the family, on the ground that the debt was a family debt for rent. The same principles were adopted in *Deva Sing v. Ram Manohar* (1880) I. L. R. 2, All. 746; in *Ram Sevak Das v. Raghubar Rai* (1880) I. L. R. 3, All. 72; in *Radha Kishen v. Bachhman* (1880) I. L. R. 3, All. 118; in *Gayadin v. Rajbansi Kuar* (1880) I. L. R. 3, All. 191; in *Ram Narain Lal v. Bhawani Prasad* (1881) I. L. R. 3, All. 443, and in *Javiam Bajabashet v. Joma Kondia* (1886) I. L. R. 11, Bom. 361.

Doubt
settled by
P. C. de-
cisions.

But whatever doubts may have existed at one time on the question, they have been set at rest by the decisions of the Privy Council in *Nanomi Babuasin v. Modhun Mohun* (1885)

I. L. R. 13, Cal. 21; L. R. 13, I. A. 1; and in *Daulat Ram v. Mehr Chand* (1887) I. L. R. 15, Cal. 70; L. R. 14 I. A. 187. In the former of these cases, Lord Hobhouse, in delivering the judgment of the Judicial Committee, observed: "Their Lordships do not think that the authority of *Deendyal's* case bound the Court to hold that nothing but *Girdhari's* coparcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own. Assuming they have such a right, it will avail them nothing unless they can prove that the debt was not such as to justify the sale. If the expressions by which the estate is conveyed to the purchaser, are susceptible of application either to the entirety or to the father's coparcenary interest alone (and in *Deendyal's* case there certainly was an ambiguity of that kind) the absence of the sons from the proceedings may be one material consideration. But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution proceedings." In the latter case, some of the members of a joint family executed a mortgage of an entire family estate. The mortgagee obtained decree upon the mortgage against the mortgagors only, and in execution of the decree caused the property to be sold. The purchaser being obstructed by the other members of the family in taking possession of his purchased property, brought the

action out of which the appeal arose. The other members did not dispute that the mortgage was binding on the family, but insisted upon the circumstance that the purchaser had purchased only the interest of the debtors on the record. Sir Barnes Peacock, in delivering the judgment of the Judicial Committee, observed—"It appears from the cases that have been cited, that notwithstanding the defendants were not made parties to the suit, still as the suit was brought on the mortgage to recover the mortgaged property, and the plaintiff in the suit obtained a decree, and executed that decree by seizing the mortgaged property, the question would be whether the mortgage included the interest of all parties, or only the right, title and interest of the two parties who were made defendants."*

It follows from what has been stated above that the description of the debtors in the decree would not debar the purchaser from showing (if that is a fact) that the interest of persons other than the debtors has also passed.

You must have seen from the observations of Lord Hobhouse in *Nanomi Babuasin's* case quoted above, that persons other than the debtors on the record would have the right to question the title of the purchaser as regards their own interest. It would, therefore, be always advisable for a creditor intending to proceed against the family-property to make parties to the suit all persons entitled to the property, even in cases where some members only, mortgage the family-property. That this course is allowable would appear from *Badri Prasad v. Madan Lal* (1893) I. L. R. 15, All. 75. In this case a Full Bench of the Allahabad High

Suit should
be against
all copar-
ceners.

Even when
the mort-
gage is
executed
by one.

* The above cases were followed in *Hari Vithal v. Jairam Vithal* (1890) I. L. R. 14, Bom. 597, and in *Sheo Pershad Sing v. Saheb Lal* (1892) I. L. R. 20, Cal. 453.

Court held that upon a mortgage executed by the father, a suit could be instituted against the father and the sons, if the plaintiff's case was that the mortgage-money benefited the father and the sons. In *Luchmun Dass v. Giridhur Chowdhry* (1880) I. L. R. 5, Cal. 855, a Full Bench of the Calcutta High Court held that, where the mortgage-debt was not shown to have benefited the family, the suit would not lie against the family, and that it might lie against the mortgagee alone if the law allowed an alienation by an undivided coparcener of his interest in joint property. For the same reasons in the case of an unsecured debt contracted by a single member of a joint family, a suit would lie against the whole body of coparceners, if it could be shown that they all were benefited by the loan.

2. Let us now come to the second disturbing element which is peculiar to sales in execution of decrees—I mean the ambiguity that arises from the imperfect description given in the certificates of sale which form the title-deeds of purchasers to the properties purchased.

Enquiry
as to what
has been
actually
purchased.

In such cases Courts are frequently called upon to consider not only whether the circumstances relied upon would justify a sale of the entire property, but whether *as a fact* the entire property was sold.

Now, we all know that when a debtor is entitled to a valuable property, it is competent to his creditor to cause a sale of such valuable property in its integrity. But, in the generality of cases, either because the creditor thinks that his dues are small compared with the value of the property, or, for other reasons, he causes a sale of some smaller interest. In such a case, even if the terms of the sale-certificate, the title-deed of the purchaser, should favour the inclusion of the bigger

Certificates
of sale
vague

interest, it would not be just to allow the purchaser to take possession of it. I have here said "even if the terms of the sale certificate would favour" the purchaser's claim; for, under the Civil Procedure Code, the only description given in the certificates is that the right, title, and interest of the debtors on the record in the property attached are sold. These terms may mean, either the share that upon a partition of the family-property may be allotted to the debtor, or the entire family-property as the interest of the managing member, the debtor. In every case of sale, therefore, the Court would have to examine the antecedent circumstances, with a view to determine if they would justify a sale of the whole property. If upon such enquiry, the Court finds that the circumstances would not justify a sale of the entire family-property, it need not pursue its enquiry further. But should it find that the circumstances might warrant a sale of the whole, it should then proceed to determine whether as a fact* the purchaser bought the whole or a fraction. In coming to a finding on this question, the Court may interpret the action of the creditor in suing one member alone as an indication of his desire to seek† the smaller relief. It may take into consideration, the price paid for the property. It may construe the proceedings in execution of a mortgage-decree as evidencing an intention to sell the entire mortgaged property. It may look upon any order of Court in the execution department refusing exemption of any portion of attached property at the instance of sons, as indi-

* *Mahabir Pershad v. Moheswar Nath Sahai* (1889) I. L. R. 17, Cal. 584; L. R. 17, I. A. 11.

† *Simbhu Nath Pande v. Golap Sing* (1887) I. L. R. 14, Cal. 572; L. R. 14, I. A. 77, which was an action against the father.

cating an intention to sell the entire family-property. *Mahabir Pershad v. Moheswar Nath Sahai* (1889) I. L. R., 17 Cal. 584; L. R., 17 I. A. 11. In every case, the question, *viz.*, whether the purchaser is entitled to the whole or a partial interest, is one of mixed law and fact. In every case the court has to see what the purchaser paid and bargained for *i. e.*, what he could reasonably think he was buying.

The result of the above discussion is, that very frequently what is actually sold is less than what was capable of being sold, and, therefore, you should not infer a sale of a particular interest, merely because such interest was capable of being sold. Thus, from what we have already observed though in execution of a decree for debt against a father, the whole ancestral property is saleable, courts have to determine upon the evidence what interest was actually sold.

It is not always easy to interpret the sale certificates. In *Nanomi Babuasin v. Modhun Mohun* (1885) I. L. R., 13 Cal. 21; L. R., 13 I. A. 1, the terms in the sale certificate were "8 annas 11¼ gundas out of the entire 16 annas, the right and interest of the judgment-debtor in mouza Rampur Bhatkhera." Now the fraction mentioned was the whole of the family-property and accordingly their Lordships of the Privy Council in speaking of the Subordinate Judge who originally tried the case, said: "he was clear that the language of the execution and sale proceedings was such that the purchaser must have thought that he was buying the entirety. It is equally clear that all parties thought the same."

In *Mahabir Pershad v. Moheswar Nath Sahai* (1889) I. L. R., 17 Cal. 584; L. R., 17 I. A. 11, their Lordships observed: "The sale certificate was issued on the 6th February 1875 to

the vakil of Chowaram, the decree-holder. After stating that all the 'right, interest and connection which the judgment-debtor had in the property,' had been purchased 'from the decree-holder,' and 'that in future the certificate shall be considered as a good evidence of transfer of the right and interest of the judgment-debtor,' it describes the property thus—'five annas four pic of mouza Udoypore *alias* Maharajgunge Pergunnah Cherand which belonged to the judgment-debtor, Rai Moheswar Nath, is sold for Rs. 10,000.' The Procedure Code at that time required that property sold in execution should be described as the right, title and interest of the judgment-debtor, and it has been held in many cases that the presence of these words in the sale certificate is consistent with the sale of every interest which the judgment-debtor might have sold, and does not necessarily import that when the father of a joint family is the judgment-debtor nothing is sold but his interest as a co-sharer. It is a question of fact in each case; and in this case their Lordships think that the transactions of the 4th and 5th January 1875 (certain petitions by the sons praying that their ancestral property which was the property of the whole family and which was put up for sale might be exempted from sale, or time granted to them) and the description of the property in the sale certificate are conclusive to show that the entire corpus of the estate was sold."

In *Basa Mal v. Maharaj Sing* (1885) I. L. R., 8 All. 205 the Court construed the sale certificate in execution of a money-decree as covering the entire interest of the family.

In *Sitaram v. Zalim Sing* (1886) I. L. R., 8 All. 231 the question arose before the execution sale as to whether the entire family-property or

merely the interest of the debtor (father) was saleable. The Court finding that the debt was not of an immoral nature directed sale of the entire property.

In *Balbir Sing v. Ajudhia Prasad* (1886) I. L. R., 9 All. 142, also, the question arose before the execution sale. There were two decrees—one upon mortgage and the other a simple money-decree and both against the father. The Court finding that the mortgage was binding on the family held that the entire property covered by it was saleable, but as regards the money-decree, the creditor having proceeded only against the father as a personal debt, was not entitled in execution to sell the entire family-property.

In *Jagabhai Lalu Bhai v. Vij Bhukandas Jagjivan Das* (1886) I. L. R. 11, Bom. 37, the sons, suing for release of their shares, had previously made an infructuous attempt in the execution department to get their interest released from sale, and the High Court held that under the circumstances, and as the father was sued as the head of a firm, the entire property was sold.

In *Jairam Bajabashet v. Joma Kondia* (1886) I. L. R. 11, Bom. 361, the High Court of Bombay finding that the decree for money, though passed against one member of the family, was really against the whole family, the other members of which were minors, and on the authority of *Bissessur Lal Sahoo v. Maharaja Luchmessur Singh* held as a fact that the entire property had been sold. It remanded the case to the Lower Court to find whether what was actually sold could be validly sold, regard being had to the allegations of the plaintiffs.

In *Krishnaji Lakshman v. Vithal Ravji Renge* (1887) I. L. R., 12 Bom. 625 the Court found that the debts were contracted for immoral pur-

poses within the knowledge of the lenders, and therefore, though the decree was one upon mortgage held that the purchaser had acquired a valid title only to the father's interest.

In *Simbhunath Pande v. Golap Singh* (1887) I. L. R., 14 Cal. 572 ; L. R., 14 I. A., 77, a father borrowed money upon a single bond—the obligation being simply on the part of the father. When he was subsequently sued upon this bond he admitted his liability and agreed that his right and interest in mouza Kindwar should be the security for the decree-debt. In execution of the decree, the right and interest of the father in mouza Kindwar was sold and purchased, and the sale certificate described the property sold as the right and interest of the father in the mouza. Under such circumstances the Privy Council held the purchaser entitled to the father's interest only. Their Lordships said—"They conceive that, when a man conveys his right and interest and nothing more, he does not *prima facie* intend to convey away also rights and interests presently vested in others, even though the law may give him the power to do so. Nor do they think that a purchaser who is bargaining for the entire family estate would be satisfied with a document purporting to convey only the right and interest of the father. It is true that the language of the certificate is influenced by that of the Procedure Code. But it is the instrument which confers title on the purchaser. Its language like that of the certificate in *Hurūai Narain's* case is calculated to express only the personal interest of Luchmun.' It exactly accords with the expressions used in the decree of August 1869, founded on Luchmun's own vernacular expressions, which the High Court construe as pointing to his personal interest alone. The other circumstances of the case aid the *prima*

facie conclusion instead of counteracting it, for, the creditor took no steps to bind the other members of the family, and the Rs. 625 which he got for his purchase appears to be nearer the value of one-sixth than of the entirety."

The case last considered was followed by the Bombay Court in *Kangal Ganpaya v. Manjappa* (1888) I. L. R., 12 Bom. 691.

In *Maruti Sakharam v. Babaji* (1890) I. L. R., 15 Bom. 87, the Court held that when the mortgage was of the whole family-property, the Court in execution ought to be held to have sold the entire property, and in the case of a money-decree against a single member (including the father), the presumption would be that the debtor's interest only was sold, though it would be open to the purchaser to rebut the presumption by showing the existence of circumstances leading to the inference that the entire property was sold as a fact.

In *Daulat Ram v. Mehr Chand* (1887) I. L. R., 15 Cal. 70; I. R., 14 I. A., 187 the decree against the managing member was upon a mortgage of the entire family-property and it was this property that was eventually sold in execution of the decree. There was no doubt, therefore, as to what was actually sold, and the Court had simply to consider, whether what was actually sold was capable of being sold *i.e.*, whether the mortgage was valid and binding on the family-property. The defendants did not contest that it was not binding and so the Judicial Committee held the whole estate had passed.

In *Bhagbut Pershad Sing v. Girja Koer* (1888) I. L. R., 15 Cal. 717; I. R., 15 I. A., 99 the mortgage was of the entire family-property by the father and it was this property that was eventually sold in execution of decree. The

sons having failed to show that the loan was for immoral purposes, the Judicial Committee held that what was actually sold was also validly sold. They further held that in the particular case it was not necessary for the purchaser to prove the existence of family necessity, or that he made any enquiry.

In *Narasanna v. Gurappa* (1886) I. L. R., 9 Mad. 424, there was no question as to the nature of the debt while it was admitted that the purchaser actually purchased the entire estate. Under these circumstances the High Court of Madras held that though the father only was the debtor named in the decree, the whole estate passed.

In *Minakshi Nayudu v. Immudi Kanaka* (1888) I. L. R., 12 Mad. 142 there was in the execution department an infructuous attempt by the sons to limit the sale. Lord Fitzgerald said: "Upon the documents their Lordships have arrived at the conclusion that the Court intended to sell, and that the Court did sell, the whole estate and not any partial interest in it. On this point see also *Janki Bai v. Mahadev* (1893) I. L. R., 18 Bom. 147.

The inferences that arise from the above cases are the following :—

1. When in execution of a decree upon mortgage of a family-property, passed against father or any other member, the mortgaged property is sold, the sale should be held to be in fact a sale of the entire family-property and not of the interest of the father or of such other member only as is named in the decree.* But whether the sale would be valid so as to pass a good legal title would depend on other considerations.

* See *ante* p. 157.

2. In the circumstances of the above case should the judgment-debtor be the father, then the purchaser would be entitled to the father's personal interest, or to the entire family-property sold, according as the *sons* should succeed or fail to prove that the mortgage-debt was to the knowledge of the purchaser incurred for immoral purposes. And if the sons fail to prove that the mortgage debt was of an immoral character to the knowledge of the purchaser, it would not be necessary for the purchaser to show either that he was satisfied upon any enquiry as to legal necessity, or, that he made any enquiry at all.

If father be mortgagor whole interest passes unless sons show the debt was immoral.

3. But if the debtor be a member of the family other than the father, then the purchaser would acquire the entire family-property, or such member's share only, according as *he* should succeed or fail to show that the mortgage debt was for a legal necessity, or that *he* made a reasonable enquiry and was satisfied of the existence of legal necessity.

When the debtor is any other member.

4. When in execution of a simple decree for money passed against a father or any other member, the interest of such debtor is sold, the sale should be presumed to be a sale of only the interest of the debtor named in the decree. But it would be open to the purchaser to show (1) that the entire family-property was, as a fact, bargained for and sold, and (2) the existence of circumstances which would support a sale of such entire property.

Sale in money-decree.

5. If, in the case last supposed, the father be the debtor, and the purchaser should show that he actually bargained for the entire property, then the purchaser would be entitled to the entire property unless the sons should show that the debt for which the decree was passed against the father was of an immoral nature.

When money-decree is against father and purchaser proves purchase of entire property.

When money-decree is against any other member.

6. But if any other member be the debtor then the purchaser would be entitled to the entire property, only upon showing (1) that he bargained for the same and (2) that the debt was incurred for a legal necessity, or, that he enquired and was satisfied that the debt was required for a legal necessity.

Difference between the positions of an execution purchaser and a purchaser at a private sale according to old decisions.

In this connection allow me to observe that a purchaser in execution of a decree for money due from a father either upon a mortgage of the family-property by the father, or otherwise, was heretofore in a better position than the purchaser at a private sale.

The money for which the decree was passed was considered an antecedent debt, *i.e.*, a debt due by the father in a transaction previous to the auction-sale, and the purchaser, if he was a person other than the decree-holder, was taken to be a *bona fide* purchaser for value. The law did not require the purchaser to look beyond the decree. In *Junnuk Kishore Koonwar v. Roghoo Nundun Sing* S. D. A. Rep. Bengal 1861 p. 222 the Judges said: "We are clearly of opinion that the plaintiff has been unable to show that the expenses for which those decrees were passed were, looking to the decrees themselves (and we cannot now look beyond these) immoral and such as, under Hindu law, the son would not be liable for." In *Girdharee Lal v. Kantoo Lall* (1874 22 W. R., 56; 14 B. L. R., 187; L. R. 1, I. A., 321, Sir James Colville said: "A purchaser under an execution is surely not bound to go beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that if the decree was a proper one, the interest of the sons as well as the interest of the fathers, in the property,

although it was ancestral, were liable for the payment of the father's debts. The purchaser, under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen (the fathers); that the property was property liable to satisfy the decree, if the decree had been given properly against them; and having enquired into that and having *bona fide* purchased the estate under the execution, and *bona fide* paid a valuable consideration for the property, the plaintiffs were not entitled to come in, and to set aside all that has been done under the decree and execution, and recover back the estate from the defendant." But this was attributing to the decree a value which it did not deserve. If the law stood as laid down in these cases, a father, intent upon dissipating family-property, had simply to borrow money, suffer a decree to be passed against him and in execution cause a sale of the family-property. Accordingly in *Nanomi Babuasin v. Modhun Mohun L. R.*, 13 I. A., p. 1 (I. L. R., 13 Cal. p. 21) their Lordships of the Privy Council said: "All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own." It would thus appear that the importance attached to the decree in execution of which the sale took place has been completely taken away. But, if on the other hand, the law as laid down in *Nanomi Babuasin's* case had stood alone, it would not have been safe for any person to purchase at an execution sale. A son might set aside *bona fide* purchases for value. To prevent this state of things, the condition laid down by their Lordships of the Privy Council in *Suraj Bunsis's* case must be established *vis.*, that it would not do for a son, seeking to avoid a sale

Debt must be shown to have been immoral to alienee's knowledge.

When the debt is immoral, or illegal, the father's share is liable.

If the debt is immoral, creditor would have no remedy against son after father's death.

by his father, to show merely that the debt for which the sale was held was contracted for immoral purposes; he must also show that such debt was immoral to the knowledge of the purchaser.

If in any case, a Court comes to the conclusion that the debt, for which a sale, purporting to convey the entire interest of the family, took place in execution of decree against the father alone, was a debt which under the law the son was under no obligation to pay, and that the purchaser was aware of the character of the debt, the sale of the entire property would not stand. But, as in such a case the father's share could have been proceeded against for his own debt, and the sale having taken place in execution of decree, it would, under the ruling in Deen Dyal's case, stand good as to such share, the proper decree to be passed would be to declare that the purchaser had acquired the rights of the father, leaving him to get such rights determined by partition proceedings. This was substantially the form of decree in Deen Dyal's case.

From what I have already said on the subject, you may have seen that unless the sale, in execution of decree against a father for debts of an immoral character, actually takes place during the father's lifetime, *i. e.*, while yet he has an interest in the undivided property, the decree-holder cannot get any benefit from his decree. For, immediately upon his death, the sons* would take by survivorship, and the father's interest would not be assets in the hands of the heirs. This is the law in all the provinces. It is true that, in Bombay and Madras, the power of alienation of the interest of single coparceners is recognized, while such power does not exist in Bengal

* Balbhadar *v.* Bisheshar (1886) I. L. R., 8 All. 495; Madho Parshad *v.* Mehrban Singh (1890) I. L. R., 18 Cal. 157 (L. R. 17 I. A. 194). Venkatarama *v.* Senthivelu 1890 I. L. R., 13 Mad. 265; Jagannath Prasad *v.* Sita Ram (1888) I. L. R., 11 All. 302.

and the N.-W. Provinces. But as regards the principles of survivorship, which we are now considering, the law is the same everywhere. Indeed, it is one of the fundamental principles of the Mitakshara; and if the son is under a legal liability to pay his father's debts, it is in the first place not to pay all debts indiscriminately, and in the second place, the liability is not because he receives his father's assets but because the Hindu law declares his liability. In this respect, indeed, it is strange that the son's liability should be limited to the ancestral property, just as in the case of the liability of any heir to the assets received by him (*ante*. p. 131) but all I can say is that the coincidence is remarkable.

I have said above that unless the sale in execution takes place during the father's lifetime, the decree-holder gets no benefit under his decree. This is true only when the decree-debt was contracted for immoral purposes to the knowledge of the lender, and even then, it should be understood with certain reservations. In the case of Suraj Bansi Koer* where the debt was found to be of an immoral nature, and the purchaser was shown to have known that it was so, the sale had actually taken place after the father's death. But because the attachment in execution had taken place while yet the father was alive, their Lordships of the Privy Council held that a valid charge had been created on the father's share. For the same† reasons, where the decree against the father was a decree upon mortgage and the decree-holder was allowed to sell the property after the father's

Exceptions

* I. L. R., 5 Cal. 148; 4 C. L. R. 226; L. R. 6 I. A. 88.

See also Rai Bal Kishen v. Rai Sitaram (1885) I. L. R. 7 All. 731; Jagannath Prasad v. Sitaram (1888) I. L. R., 11 All. 302; Beni Pershad v. Parbati Koer (1892) I. L. R., 20 Cal. 895.

† Rangayana Shrinivasappa v. Ganapabhatta (1891) I. L. R., 15 Bom. 673; Sivagiri Zamindar v. Tiruvengada (1884) I. L. R., 7 Mad. 339.

death in the presence of his heirs, the purchaser was held to have acquired a valid title to the father's share, if not to any thing more. And this would be true not only in Madras and Bombay where alienations of coparcenary interest are recognized, but also in Bengal and the N.-W. P., by reason of the debt being, as it were, a charge on property.

The attachment considered in the preceding paragraph must be one after decree; for, attachment before decree will not have this effect. See *Ramanayya v. Rangappa* (1893) 1. L. R., 17 Mad. 144.

If the debt be not immoral or illegal the death of the father does not defeat the right of his creditor against the son.

But if the debt be one for which the sons can be legally made liable, the death of the father after a decree has been passed against him and before it has been executed should not disconcert the decreeholder. In such a contingency, a suit against the sons, on the basis of the antecedent decree-debt, may be instituted by the creditor for recovery of his money, from the whole of the ancestral estate. See *Karnataka Hanumantha v. Andukuri Hanumayya* (1882) 1. L. R., 5 Mad. 232; *Udaram Sitaram v. Ranu Panduji* (1875) 11 Bom. H. C. R. p. 76; and *Lachmi Narain v. Kunji Lal* (1894) 1. L. R., 16 All. 449.

A private sale failing as to entire interest may be valid as to a coparcener's interest.

I have up to this time considered cases of sale in execution of decree as to which the law is the same in all the provinces. As regards the law of private alienations of the interest of an undivided coparcener, the law in Bengal and the N.-W. Provinces is, as we have already seen, different from that of Bombay and Madras. In Bengal and the N.-W. P. no individual member can privately alienate his undivided interest in the family-property. And, accordingly, if a father purporting to sell for a valid antecedent debt sells the entire interest in an estate for what, after

all, turns out to be an immoral debt to the knowledge of the purchaser, the alienation, if in Bengal or the N.-W. P., would fall through *in toto*; but in Madras and Bombay, it would be good as to the father's share.

In this part of our subject, we have been considering the rights of sons to question alienations made by their fathers. But it is well to remember that it is only those sons who were in existence at the date of the alienations that have the right to question them. Previous to their birth, the father was independent of them and their rights arose only on their birth. If the father had any sons previous to the alienation, such pre-born* sons and their father represented the entire coparcenary, and if they together made the alienation, it cannot be questioned by the after-born sons. For the same reasons, if the father had no son at the date of the alienation, the purchaser from the father would take an indefeasible title. It is true that the original texts speak of the "yet unbegotten" sons but the case-law† on the point has settled the question to the effect, that the text contemplates only the case of a son in the womb at the time of the alienation.

After-born
sons.

In several cases, sons who can question alienations made subsequent to their births are subsequently made to ratify them by consent. In such cases the consent of after-born sons *i. e.*, of sons born after the alienation in question should be obtained, along with the consent of the other sons

Ratification.

* *Rajaram Tewary v. Luchmun Pershad* (1867) 8 W. R. 15; B. L. R. Sup. Vol. 731; *Girdhari Lall v. Kantoo Lall* (1874) 22 W. R. 56; 14 B. L. R. 187; L. R. 1 I. A. 321.

† *Yekeyamian Agniswarian* (1869) 4 Mad. H. C. Rep. 307. The Privy Council declined to pass any opinion in *Parichat v. Zalim Singh* (1877) L. R. 4 I. A. 159; I. L. R., 3 Cal. 214; *Sabapathi v. Soma-sundaram* (1882) I. L. R., 16 Mad. 76.

who did not ratify the transactions before the birth of the after-born sons; for, it has been held that alienations which are invalid as against some sons are also invalid against others who came into existence before the alienations* were made valid by subsequent ratification.

**Equities
which arise
on setting
aside sales.**

It remains for me to notice the cases in which the equities require that the setting aside of a sale should be attended with certain conditions.

**No refund
in cases of
execution
sales.**

In cases of sales in execution of decrees, where it is doubtful what interest the purchaser has acquired by his purchase—the doubt arising, either because one of the members was sued, or because of the imperfect description of the property in the sale-certificate—and the court determines that though the purchaser thought he was purchasing too much, he has become entitled by his purchase to a smaller interest, the court merely construes the sale proceedings and does not set aside a sale, wholly or in part. In such a case the purchaser can have no claim to a refund of any portion of the purchase money paid by him. And this is so, because the purchaser paid for what he bargained, or, because the person who gets the benefit of such a decision— a coparcener who was no party to the original suit— is one who derived no advantage from the purchase-money. We may therefore leave these cases out of our consideration on the present occasion. So in Madras and Bombay where private alienations, of the interest of individual members, not consented to by the other members, are recognised, in the event of a private alienation of the entire family-property by a single member for an alleged necessity being questioned by the other coparceners, the

* See *Hurodoot Narain Sing v. Beer Narain Sing* (1869) 11 W. R. 480.

alienee can have no equitable claim to refund of any portion of the purchase money from the plaintiff-coparceners. If in any case, the alienor deceives the alienee into believing that he has a right to convey a bigger interest than he really possesses, the purchaser, upon his purchase being limited to a smaller interest, may have a claim for compensation against the alienor, but none whatever against the person whose interest was not affected by the sale. And if in such a case it be the duty of the coparcener seeking to have the sale set aside, wholly or partially, to pay such compensation, *i.e.*, the compensation which his coparcener, the alienor was bound to pay, courts may, and ought to, declare that the sale be set aside, in part or wholly, only upon the condition of such coparcener-plaintiff paying the compensation. Thus, in Bengal where a private sale of the entire coparcenary property by a single coparcener can take place only for legal necessity, including the payment of an antecedent debt, if in any case the plea of legal necessity is not made out, the sale must under Sadabart's case, be set aside *in toto*. But if the alienor be the father, then whether he be alive or not at the setting aside of the sale, the consideration received by him would be a debt binding on the sons, unless it was spent by him for immoral purposes; and the Court, in setting aside the sale at the instance of the sons, may provide, as a condition precedent, that the purchase-money should be paid. But, if the consideration money were spent for immoral purposes, and the sale be set aside after the father's death, the decree should be without any conditions. For, upon the death of the father, the ancestral property by survivorship became the property of the sons, and the creditor, by the death of his debtor, lost all remedy. On the other hand, if the consideration money

But consideration money must be refunded by plaintiff if he should be otherwise liable for it

Court may declare lien of purchaser on setting aside a sale.

were spent for immoral purposes, and the sale set aside during the father's lifetime, the creditor would be competent to proceed immediately against the father and sell his interest in execution of decree. In such a case, therefore, a Court of equity may, as in the case of *Mahabeer Persad v. Ramyad Sing* (1873) 12 B. L. R. 90 ; 20 W. R. 192, order that the property should be thenceforth possessed in defined shares, and that the shares of the vendors should be subject to a lien for the return of the purchase money. So also, if the alienation be made by any other member, and if at the date of the setting aside of the sale such member be alive, then it would not be equitable to set aside the sale and allow such member to receive his share discharged of the lien for the purchase money. The decree ought to be made as in the case of *Mahabeer Persad*, of which the decision was approved by the Privy Council in *Madho Persad v. Mehrban Sing* (1890) 1. L. R., 18 Cal. 157 ; 1. R. 17 I. A. 194. But if the vending coparcener be dead at the time of the setting aside of the sale, the creditor would have no claim to lien or to refund. See the judgment in the case of *Madho Persad* above cited.

In *Jamuna Parshad v. Ganga Pershad Singh* (1892) 1. L. R., 19 Cal. 401 two out of three coparceners executed a mortgage of some joint properties in favour of one person, and then all the three executed a mortgage of the same properties in favour of another person. The prior mortgagee after the creation of the second mortgage sued all the three coparceners and obtained a decree. The second mortgagee thereafter instituted suit against all the three mortgagors and obtained a decree, and in execution thereof the plaintiffs purchased the mortgaged property. After the plaintiffs' purchase in execution of the second decree, the

previous mortgage-decree was executed, and the defendant purchased the property. The plaintiffs, who were the purchasers in execution of the decree upon the mortgage by all three coparceners, then sued the defendant for a declaration that the mortgage by two out of three coparceners was inoperative, and that the defendant had acquired no lien by his purchase in execution of decree upon the mortgage. The court held that the mortgage by the two coparceners was not proved to have been for legal necessity and was, therefore, according to the law as interpreted in Bengal, invalid: but as an unconditional setting aside of the mortgage would enure to the benefit of the two coparceners, and through them to the plaintiffs, the Court in accordance with the principle laid down in *Mahabeer Persad v. Ramyad Singh* (1873) 12 B. L. R., 90 declared that the first mortgage-debt was a charge on the shares of the mortgagors which the plaintiffs had purchased.

The Reports teem with decisions of the several High Courts and of the Privy Council on the several questions considered in this Lecture. I have not attempted to reconcile them all, and indeed such an attempt would have been fruitless. That the decisions are so irreconcilable appeared to the Judicial Committee itself. In *Nanomi Babuasin v. Modhun Mohun* (1885) I. L. R., 13 Cal. 21, Lord Hobhouse is reported to have said (p. 35). "There is no question that considerable difficulty has been found in giving full effect to each of the two principles of the Mitakshara Law; one being that a son takes a present vested interest jointly with his father in ancestral estate, and the other that he is legally bound to pay his father's debts, not incurred for immoral purposes, to the extent of the property taken by him through his father. It is impossible

Reported cases on the subject of this Lecture do not all seem to be reconcilable.

to say that the decisions on this subject are on all points in harmony, either in India or here." So in *Laljee Sahoy v. Fakeer Chand* (1880) I. L. R., 6 Cal. 135 (p. 137) Justice Pontifex, in delivering the judgment of the Court, said: "This appears to us to be one of those fraudulent cases on the part of a Mitakshara father and son which have led to the late fluctuating developments of Mitakshara law."

LECTURE IV.

Joint Property under the Dayabhaga.

Hindu law, personal law—Particular Hindu law governs particular localities—Domicile ordinarily determines the School of law—Joint property under Dayabhaga contrasted with that under Mitakshara—Partition under Mitakshara—under Dayabhaga—Family with father at head no joint family under Dayabhaga—Joint-tenancy and Mitakshara coparcenary—Tenancy-in-common and Dayabhaga coparcenary—Son has no interest in father's property, acquired or ancestral, during father's lifetime—Mitakshara texts explained away by Jimutavahana—Texts against alienation of whole property—Doctrine of *factum valet*—Mode of living in joint families under Dayabhaga—Maintenance—Maintenance of wife, infant sons and aged parents—Right to maintenance of unmarried sisters—of widowed daughter-in-law—of mother and step-mothers at partition—of disqualified members—Whether maintenance is charge on property—coparcenary and partnership concern—managing member's liability to account—existing assets only to be divided—Minor members—observations as to the existing practice of executing conveyance &c., and instituting suits—When adult members bound by managing member's acts—Adult members can demand partition—Minors too can demand partition—Effects not liable to partition—Gains of science—Gifts of affection—Marriage presents—Recovered property—Presumptions—Any member of joint family can alienate his interest—Purchaser's right to demand partition—woman's estate in property inherited—In Bombay the law is different—Sisters inherit in Bombay—Daughter's estate in Bombay—Sale for legal necessity—Guardians and Wards Act VIII of 1890, Sec. 29.

We have already seen that in any part of British India, Hindu law is the personal law of a Hindu by birth and religion, and I presume you know that a family, governed by the special doctrines of any particular school of Hindu law, may migrate from one province to another and yet continue to

Hindu law,
personal
law.

Particular
Hindu law
governs
particular
localities.

be governed by the doctrines of its own school.* This may seem to imply that there is no locality or territory which generally is governed by the doctrines of any particular school. But the fact is otherwise. In Bengal, the majority of the inhabitants are governed by the Dayabhaga of Jimutvahana and *prima facie*, therefore, every Hindu resident in Bengal must be presumed to be subject to the Dayabhaga law, until he is shown to be subject to a different school (Ram Das v. Chandra Dassia, (1892) I.L.R., 20 Cal. 409). This, you must remember, is a presumption of fact and the strength of the presumption will depend upon the facts of each case. Thus, in a commercial town like Calcutta, where people of different nationalities and religious persuasions reside, side by side, the presumption will be very weak. It may be rebutted by proving that the domicile of the family is a Mitakshara territory, or, that the family originally migrated from a Mitakshara province and in its new abode has continuously observed the peculiar rites of the Mitakshara in marriages, births and deaths (Ram Bromo v. Kaminee 6 W. R., 295). With these prefatory remarks I shall confine my attention for a time to the law of joint property under the Dayabhaga.

Domicile
ordinarily
determines
the school
of law.

Joint pro-
perty under
Dayabhaga
contrasted
with that
under
Mitakshara

The Dayabhaga conception of joint property is very different from the Mitakshara. Under the latter, as regards ancestral property, the sons and grandsons acquire a right by birth, with their father and grandfather. Under the former the father is the absolute owner of all ancestral, not

* Rutcheputti Dutt Jha v. Rajunder Narain Rae (1839) 2 M. I. A. 133. Byjnath Pershad v. Kopilmon Singh (1875) 24 W. R. 95. Surendra Nath Roy v. Hiranani Barmani, (1868) 12 M. I. A., 81; 1 B. L. R., P. C., 26; 10 W. R., P. C., 35. Sreemutty Dibeah v. Koond Luta (1847) 4 M. I. A. 292; 7 W. R. P. C., 44. Manik Chand Golecha v. Jagat Settani (1889) I. L. R., 17 Cal. 518. Padmavati v. Doolar Singh (1847) 4 M. I. A., 259; W. R. P. C., 41.

to mention of his self-acquired, property. Under the Mitakshara, partition is one of the modes of acquisition of property like inheritance, seizure, etc., and before partition no one can predicate what his share would be at the partition when made; but under the Dayabhaga, partition is merely the outward manifestation of previously existing separate interests. Under the Mitakshara, there may exist joint families consisting only of a father and sons and grandsons, and in such joint families the rights of the members, as regards the ancestral property of the family, will be co-ordinate, but under the Dayabhaga such families will not come under the denomination of a joint family—the sons being absolutely dependent on the father.

Partition
under
Mitakshara.

under
Dayabhaga.

Family with
father at
head no
joint family
under
Dayabhaga.

It is usual to compare a coparcenary under the Mitakshara with an English joint-tenancy, and family-property under the Dayabhaga, with an English tenancy-in-common. But though the analogy between a coparcenary and a joint-tenancy is not so close, the analogy between a Dayabhaga joint family and tenancy-in-common is marked. I have said that a joint-tenancy and a coparcenary under the Mitakshara do not bear a very close resemblance to each other. A word is necessary to explain my meaning. Joint-tenants have unity of possession, as we have seen in Lecture I.* So have the members of a Mitakshara coparcenary unity of possession. In a joint-tenancy, there is no descent of interest upon the death of any joint-tenant, but the survivors take up his interest. So, in a Mitakshara family consisting of a father and sons, upon the death of one of the sons, the survivors take up the interest of the deceased. Should one of two joint-

Joint-ten-
ancy and
Mitakshara
coparce-
nary.

tenants convey his interest in the tenancy to a third person, the nature of the tenancy would be changed into that of a tenancy-in-common. So, in Madras and Bombay, should one of two coparceners alienate his undivided interest, or in any province should an execution sale take place in reference to the interest of such member, the coparcenary would be changed into a tenancy-in-common. But here the resemblance ceases. In a joint-tenancy, while the tenancy continues as such, none but the original tenants, or the survivors of them, can have any interest in the tenancy, and by deaths the interests of the survivors go on continually increasing. But in a Mitakshara coparcenary, new members are continually added to the original number by births. The resemblance between joint-tenancy under the English law and a Mitakshara coparcenary is, therefore, not very close. But the resemblance between joint property under the Dayabhaga and the English tenancy-in-common is striking.

Tenancy-in-common and Dayabhaga coparcenary.

Tenancy-in-common under the English law, "is created when several persons have several distinct estates, either of the same or of a different quantity, in any subject of property, in equal or unequal shares, and either by the same act or by several acts, and by several titles and not a joint title.....Tenants-in-common have several and distinct estates in their respective parts; hence the difference in the several modes of alienation and assurance by them. Each tenant-in-common has, in contemplation of law a distinct tenement and a distinct freehold...Tenants-in-common hold by unity of possession, because neither of them knows his own severalty and therefore they all occupy promiscuously. This is the only unity belonging to the estate; for since the tenants may hold different kinds of interest, so there exists no

necessary unity of interest, and there is no unity of title; for, one may claim by descent, and another by purchase; also the estate may vest in each tenant at different times. There being no unity of interest among tenants-in-common, each is seised of a distinct though undivided share: they hold *per mie et non per tout* and consequently the *Jus accrescendi* does not apply to them..... This estate is dissolvable by a voluntary deed of partition; by the union of all the titles and interests in one tenant..... or by compulsive partition under decree."—Wharton •

We shall now see how a joint property or ownership is created under the Dayabhaga. I presume you know that under the Dayabhaga of Jimutvahana if a man should die intestate leaving sons, grandsons by predeceased sons, and great-grandsons whose fathers and grandfathers predeceased him, the inheritance would devolve on the sons, grandsons, and great-grandsons—the grandsons and great-grandsons taking respectively the shares of their predeceased fathers and grandfathers along with the sons. It is optional with the sons, grandsons and great-grandsons to divide among them the inheritance, according to their several shares as above indicated. But if they do not divide the inheritance they live together as members of a joint family. During the time that they so live jointly, their shares are defined. Fresh births in the family do not reduce their shares, though deaths bring them in new shares by right of inheritance. They can dispose of their shares, entirely or partially, by sale, gift, or devise. They can by partition, made voluntarily or under decree of Court, transform their joint estate into several estates. •

You will now understand the analogy between joint ownership under Dayabhaga and tenancy-

in-common under the English law. In both there is unity of possession. In both none of the members knows his own severalty and all of them therefore occupy promiscuously. Both the estates are dissolved under the same circumstances and to neither does the principle of *jus accrescendi* apply.

Son has no interest in father's property, acquired or ancestral, during father's lifetime

I have said above that under the Dayabhaga the son has no interest in his father's property so long as the father is alive. A word is necessary to explain this: Jimutvahana* "defines the term heritage" as "wealth, in which property, dependant on relation to the former owner, arises on the demise of that owner." He quotes Manu Book 9 sloka 104, which runs in these words: "after the death of the father and the mother, the brethren, being assembled must divide equally the paternal estate: for they have no power over it, while their parents live."

Apprehending that his opponents might seek to apply the above text of Manu as a prohibition against partition during the lifetime of the parents, Jimutvahana in para. 18, fortifies himself with a text of Devala which runs thus:—"When the father is deceased, let the sons divide the father's wealth: for sons have not ownership while the father is alive and free from defect." The conclusion come to by the author is thus stated in para. 30: "Hence the texts of Manu and the rest (as Devala para. 18) must be taken as showing, that sons have not a right of ownership in the wealth of the living parents but in the estates of both when deceased". The conclusion is very clearly expressed.

Mitakshara texts explained away by Jimutvahana.

I have† elsewhere observed in the course of these Lectures that the original *smritis* are universally respected. It is amusing to note, how the texts of Yajnavalkya, which form the groundwork

* Ch 1. para. 5.

† *Ante* p. 12.

of his theory of equal rights of father and son in property ancestral, have been explained away in the Dayabhaga. Jimutvahana in ch. II, para. 9, speaking of the text, "The ownership of father and son is the same in land which was acquired by his father or in a corrody or in chattels," explains it in these words: "when one of two brothers, whose father is living, and who have not received allotments, dies leaving a son: and the other survives; and the father afterwards deceases; the text, declaratory of similar ownership, is intended to obviate the conclusion, that the surviving son alone obtains his estate because he is next of kin. As the father has ownership in the grandfather's estate: so have his sons, if he be dead. There is not in that case, any distinction founded on greater or less propinquity; for both equally confer a benefit by offering a funeral oblation of food, as enjoined at solemn obsequies." In the same way the text, "the father is master of the gems, pearls and corals and of all other movable property, but neither the father nor the grandfather is so of the whole immovable estate," has been explained in ch. II, para. 24, in the following words:—"The prohibition is not against a donation or other transfer of a small part not incompatible with the support of the family. For, the insertion of the word 'whole' would be unmeaning if the gift of even a small part were forbidden." We might multiply instances. But it is sufficient to note that the Dayabhaga draws a distinction between moral and legal precepts, while the Mitakshara knows of no such distinction. To render my meaning clearer, I shall quote here paragraphs 28-30 of ch. II. They run in these words:—

"28. But the texts of Vyasa exhibiting a prohibition, are intended to show a moral offence: since the family is distressed by a sale, gift or

Texts
against alie-
nation of
whole pro-
perty.

other transfer, which argues a disposition in the person to make an ill use of his power as owner. They are not meant to invalidate the sale or other transfer.

" 29. So likewise other texts (as this, ' though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made by him, unless convening all the sons ') must be interpreted in the same manner. For here the words "should" be made, must necessarily be understood.

**Doctrine
of *factum valet*.**

" 30. Therefore, since it is denied, that a gift or sale should be made, the precept is infringed by making one. But the gift or transfer is not null: for a fact cannot be altered by a hundred texts " This is the doctrine of "*factum valet*."

The Mitakshara makes a distinction between ancestral and self-acquired property, but the Dayabhaga observes no such distinction in considering the right of sons to their father's wealth.

**Mode of
living in
joint fami-
lies under
Dayabhaga.**

The mode of living in joint families under the Dayabhaga is the same as under the Mitakshara. The members live joint in food, worship, and estate. But in a Dayabhaga family, unlike what we have seen in a Mitakshara family, the father is the absolute owner of all ancestral and self-acquired property, and his sons and grandsons are mere dependants on him. When treating of the question of maintenance under the Mitakshara, we saw that, independently of the possession of joint property, a father is bound to maintain his infant sons, his unmarried daughters, his wife and his parents.* This observation applies equally to a Dayabhaga family and as a logical inference a father is not bound to maintain his adult son or grandson. But in a Mitakshara family, the sons and grand-

* Ante p. 69.

sons, being joint owners with the father and grandfather in ancestral property, have every right to maintenance from out of such property. In several Dayabhaga-families, the members separate in food and worship, and as to property they allow it to be managed by a common manager, and divide the nett income among themselves. But this is properly one mode of partition or separation. There is, in Bengal, another class of families in which the ancestral property consists mostly of a dwelling house or other property yielding no income, and the members live abroad for earning their livelihood by service or profession. These families are also to be deemed separate, except as regards the ancestral property. But we are now considering the case where the members, though they have separate interests, choose to live together with one purse and under the management of one of them as the *kurta*. In such cases, no separate accounts of the incomes of the different members, or of their separate expenditure are kept and expenses of education, maintenance and marriages are defrayed according to the actual wants.

In a previous Lecture, I considered the question of maintenance to which some of the dependants may be entitled under the Mitakshara, irrespective of the possession of any joint property.* We saw that under the Hindu law (Dayabhaga as well as Mitakshara) the wife, infant sons and aged parents are enjoined to be provided for. Under the Mitakshara unmarried daughters have a claim to a fourth† share at a partition, and hence we inferred that under that law they have also to be provided for, so long as the family con-

Mainten-
ance.

Of wife, in-
fant sons,
and aged pa-
rents.

* Ante p. 69.

† Mitak. ch. I, sec. VII, para. 5

Right to maintenance of unmarried sisters.

Of widowed daughter-in-law.

tinues in the possession of its joint property. We also saw that a mother's claim to maintenance rested on several grounds. We quoted positive texts from *Manu* as to the maintenance of the mother,* wife and infant sons. These texts are equally binding under the *Dayabhaga*. As to the unmarried sisters, when the family is possessed of ancestral property there is a positive declaration in the *shastras* for a portion being allotted to her (see *Dayabhaga* ch. III, sec. II, para. 34). Moreover her right has to be respected because it was the duty of her father to support her, and *a fortiori*, after the death of the father, it becomes the duty of her brothers,† who inherit their father's property for his spiritual benefit, to provide her with proper food and raiment.

A widowed daughter-in-law is in a better position under the *Mitakshara* than under the *Dayabhaga*. In a *Mitakshara* joint family by reason of the undivided interest of her deceased husband lapsing to the survivors, these latter are bound to maintain her. But under the *Dayabhaga* she has no legal claim on her father-in-law for maintenance. *Vide* Full Bench decision in *Khetramani Dasi v. Kashinath Das* (1868) 2 B. L. R., 15 A. C; 10 W. R., F. B., 89, which laid down that she had only a moral claim on her father-in-law which could not be enforced in a court of justice. This is the leading case on the subject. In *Kamini Dassee v. Chandra Pode Mondle* (1889) I. L. R., 17 Cal. 373, Justice Banerji held that a man might be legally bound to maintain his widowed sister-in-law (brother's widow) if he inherited property from his father who was morally bound to maintain her.

* Ante p. 68.

† *Kamini Dassee v. Chandra Pode Mondle* (1889), I.L.R. 17. Cal. 373.

Whether a sister-in-law possessed of wealth can claim maintenance from her brother-in law is an open question.

As to the rights of mothers to maintenance under the Dayabhaga, see the case of Kedarnath Coondoo Chowdhry *v.* Hemangini Dasi I. L. R., 13 Cal. p. 336; in appeal to the Privy Council Hemangini Dasi *v.* Kedar Nath Kundu Chowdhry (1889) I. L. R., 16 Cal. p. 758 or I. R., 16 I. A., p. 115. In this case the Judicial Committee held that the share allotted to a mother on partition is in lieu of maintenance, and that so long as the estate remains joint and undivided the maintenance of the mother is a charge on the *whole* estate; but where a partition takes place among sons of *different* mothers each mother is entitled to maintenance, only out of the share or shares allotted to her son or sons. Thus, if a man dies leaving two widows and seven sons, of whom two are by one widow and the remaining five by the other, the inheritance will be divided into 7 shares among the sons, and the widow who is the mother of two sons will receive $\frac{1}{3}$ of $\frac{2}{7}$ ths share, and the other widow $\frac{1}{6}$ of $\frac{5}{7}$ ths share of the inheritance. If the sons of the same mother choose to remain joint after separation from their half-brothers, then the mother's claim to maintenance attaches only to the share allotted to her sons, and not to the share allotted to her stepsons.

Of mothers
at partition.

As to disqualified members, except the out-cast and his sons, the others would be entitled to maintenance from those who would take what would have been their just inheritance but for the disqualification, (see Dayabhaga ch. V, para. 11). Such disqualified members, when their father is the owner, would have a legal claim on him for maintenance, and after his death, on his heirs. Their wives and unmarried daughters would also be

Of disqualified
members.

entitled to maintenance from those who take their shares.

We shall in a subsequent Lecture see who are the several persons who have been declared disqualified to inherit.

Whether maintenance is charge on property.

The question whether maintenance is a charge on property has been fully considered when discussing the incidents of joint property under the Mitakshara law.* The same discussions you will consider applicable to cases under the Dayabhaga.

Coparcenary and partnership concern.

The observations of Justice Markby† in contrasting a Dayabhaga family with a partnership concern have been quoted in a previous Lecture. In that connection you will also remember the discussion that we made as to the power which a managing member or *kurta* possesses in a joint family. In a Dayabhaga family, as well as in a Mitakshara, he will be liable‡ to account, and that on the same principles; *i.e.*, no member would be competent to take exception to any expenditure *bona fide* incurred on behalf of any member in excess of the legitimate share of the income of the latter. At a partition too, the *existing* assets are only to be divided, and if any family-property has been sold away during the time of joint ownership, such property would go out of the entire coparcenary property, and what has been consumed by a co-heir over and above his due proportion he should not be required to make good.

Managing member's liability to account.

Minor members.

In Bengal, as elsewhere, the minor members of a family are represented by their elders. But, unlike what we see in a Mitakshara territory, if a mortgage or a sale has to be effected of the entire family-property, the mortgage or the conveyance

* Ante pp. 74-78.

† Ante p. 79.

‡ Ante p. 82.

is executed on behalf of all the members of the family entitled to the property. Similarly if a suit has to be instituted by or against the whole family in respect of any coparcenary property, all the members of the family interested in the property are made plaintiffs or defendants to the suit. And in all cases of mortgages, sales and suits the minors are represented by their elders when they have no conflicting interest.

It would have considerably simplified the Mitakshara law of alienations of joint property, if in all cases of legal necessity, where the intending mortgagee or purchaser wished to acquire an interest in the whole property, he had insisted upon all the persons entitled to the coparcenary being joined as executants of the mortgage or conveyance, and if, similarly, the creditors, intending to proceed against the whole coparcenary property, had made all the persons entitled to the coparcenary, defendants to their actions. But as we saw in Lecture III this is seldom done. And our courts of law which have to administer equity are obliged to lay down inconsistent principles to meet the exigencies of particular cases.

Let us next see whether if an adult co-sharer does not join with the managing member in the execution of a mortgage or conveyance, such mortgage or conveyance would bind him, and if so, under what circumstances.

The adult members of a family have as much right as the managing member to look after the management. If they choose to allow the managing member to look after the affairs of the family, such managing member acts as their agent and he can bind them by his acts, performed within the ordinary scope of his agency. Of course, if the manager acts in contravention of the express or implied wishes of any adult member, such acts

Observations as to the existing practice of executing conveyances &c. and instituting suits.

When adult member is bound by managing member's acts.

would not bind such member. Then again, we have seen that in several families there exist ancestral trades which often are very profitable sources of income. These trades are generally placed under the management of single members, and they can not go on unless the managing members would have the power, in cases of emergency, to contract loans and mortgage properties without consulting their co-sharers. Thus, by the necessity of circumstances, the acts of the manager would be *prima facie* binding on the adult members, even without their being parties to the transaction. On this point see:—*Saravana Tevan v. Mutayi Ammal* (1871) 6 Mad. H. C. Rep 371; *Bemola Dossee v. Mohun Dossee* (1880) I. L. R., 5 Cal, 792.; *Ramlal Thakursidas v. Lackmichand Muniram* (1861) 1 Bom H. C. R., App 57; *Trimbak Anant v. Gopalshet* (1863) 1 Bom H. C. Rep. A. C. 27; *Johurra Bibee v. Sreegopal Misser* (1876) I. L. R., Cal., 470; *Miller v. Runga Nath Moulick* (1885) I. L. R., 12 Cal 389; *Ratnam v. Govinda Rajulu* (1877) I. L. R., 2 Mad. 339.

Adult member can demand partition.

If an adult member of the coparcenary finds reason to be dissatisfied with the management, he may at once demand partition. His rights are co-ordinate with those of the other members, and, each of them therefore would have the right to a partition.

Minor too can demand partition.

Nor will the existence of any minor shareholder prevent the division being made. The Hindu law contemplates such divisions during the minority of some of the members,* as is evident from the following text of *Katyayana*—"Let them deposit free from disbursement in the hands of kinsmen and friends the wealth of such as have not attained majority as well as of those who are absent." At the present time managers appointed on behalf of

* *Dayabhaga* ch. III. sec. 1, para. 17.

minors take care of their property, and when a partition is effected under orders of a court of justice, the Court has to examine the allotments and sanction them, as we shall see in a subsequent Lecture. As regards the minor members of the coparcenary, their guardians may on proof of malversation demand a partition, though otherwise, according to the present state of authorities* a minor cannot seek a partition.

Jimutvahana devotes a whole chapter (Chap. VI) to the consideration of the various sorts of effects and acquisitions exempt from partition. While dealing with the Mitakshara law of joint property, we saw that even while a family continued joint, individual coparceners thereof might enjoy their self-acquired properties which were exempt from partition *i. e.*, which would not be divided at a general partition of the coparcenary property. We also saw that some only of the members of a coparcenary might, as among themselves, own such property, and it would not† be divided at a general partition of the coparcenary property, though it would be divisible among its separate owners. The same observations apply to separate acquisitions in a Dayabhaga family.

Jimutvahana enumerates properties not liable to partition in the following order:—

(A) Gains of science including (1) prize for the solution of a difficulty, (2) fee for instructing a pupil, (3) fee for officiating at religious rites, (4) reward for solving a question, (5) reward for clearing a doubtful point or for deciding a litigated question, (6) reward for display of science, (7)

Effects
not liable
to partition.

Gains of
science.

* Chokkalingam Pillai *v.* Svamiyar Pillai (1862) 1 Mad. H. C. R. 105; Alimelammal *v.* Aruna-chellam Pillai (1866) 3 Mad. H. C. R. 69; Kamakshi Ammal *v.* Chidambara Reddi (1866) 3 Mad. H. C. R. 94; Damoodur Misser *v.* Senabutty Misraim (1882) 1. L. R. 8 Cal. 537; 10 C. L. R. 401; Mahadev Balvant *v.* Lakshman Balvant (1894) 1. L. R. 19 Bom. 99.

† Ante pp. 55-64.

Gifts of affection.

Marriage presents.

Recovered property.

Presumptions.

Any member of joint family can alienate his interest.

prize gained or stake won in a disputation, (8) prize for reading, (9) the gain of a skilful artist and (10) a stake won by skill in play ; (B) gifts of affection ; (C) nuptial presents ; (D) clothes (personal apparel) and raiment intended to be worn at assemblies, vehicles (carriages and horses and the like), ornaments (rings and so forth), prepared food (sweetmeats &c.), water (contained in a pond or well as suited to use), women (other than female slaves), and furniture for repose or for meals, (beds and vessels used for eating and sipping and similar purposes) ; (E) gains of valour, as spoil taken under a standard ; and (F) ancestral property, except land, recovered by any member without detriment to ancestral wealth. As to ancestral land recovered by a member by his own exertions, the law is that a fourth part* should be allotted to the acquirer and then division made equally†.

The law of presumptions, as to (1) whether a family is joint or separate and (2) whether a particular property is the joint property of the family or the separate property of any of its members, is the same under the Dayabhaga as that under the Mitakshara. Here also, as in the Mitakshara, no inference can be drawn as to the ownership of any property from the fact of the title-deeds of such property standing in the name of any single member of the family.†

The shares of the coparceners in a joint Dayabhaga family being definite and known, any one of them can convey a valid title to a person by sale, gift or mortgage. Upon such transfer the vendee, donee or the mortgagee acquires a good title to the share of the coparcener, and he may demand a partition by metes and bounds. When considering the question of alienation of the

* Dayabhaga ch. VI. sec. II. para. 38

† See Ante pp 87-94

undivided interest of one out of several members of a joint Mitakshara family, we saw (p. 120) that where such alienation was valid, the purchaser acquired the right of the vendor to demand partition, and as partial partition was not allowable, except with the consent of all the coparceners, the purchaser had to seek partition of the entire family property, in the presence of all the parties interested. But the purchaser of the undivided interest of a member of a Dayabhaga coparcenary in a particular property is in a different position. He may seek partition, by metes and bounds, only of the property in which he is interested. This difference is owing to the idea that in a Mitakshara family, none of the coparceners has any definite share before partition, and all that the purchaser purchases is not the particular coparcener's *share* in any particular property, but only the *interest* of the particular coparcener in the property as may be determined at a general partition of the entire coparcenary property. But an undivided member in a Dayabhaga family possesses not only a definite share in the entire coparcenary property, but the same share in every village or mouza comprised in the coparcenary. It is true, that if, while the members of the coparcenary are in joint possession of all their estates, a partition be effected, the same share in each mouza or village would not be allotted to a sharer, but as each member in the absence of any special circumstance would be *prima facie* entitled to the same share in each mouza, a court of equity would give effect to the purchase of the share in any mouza by causing a separation of the mouza from the rest and then dividing the mouza itself.

Purchaser's right to demand partition.

In a Mitakshara joint family, females cannot be coparceners with males, though, in a case of partition they may share together; as, when a

mother shares with her sons &c. But in a Daya-bhaga family they often share with the males. Thus, suppose of two brothers, living together in possession of joint property, one were to die leaving two sons, and the other, a widow and no son. In this case the family property under the Daya-bhaga would belong—one moiety to the widow and the other to her two nephews jointly, so that the aunt and her nephews would be the coparceners, or, more properly, co-sharers. But if the family be governed by the Mitakshara law, the two nephews would be the exclusive owners of the coparcenary, and the aunt would be simply entitled to maintenance.

Woman's
estate in
property
inherited.

In Bombay
law is dif-
ferent.

Sisters
inherit in
Bombay.

Daughter's
estate in
Bombay.

Under the Hindu law in all the provinces except Bombay, the rights of all female heirs in property inherited by them are of a peculiar nature. In Bombay, the decisions recognize the heirship of sisters to the property of their brothers,* and draw a distinction between the nature of rights enjoyed by female heirs who belong by marriage to the *gotra* of the propositus and the interest of those who by marriage belong to a different *gotra*.† Thus, a daughter and a sister, who by marriage would belong to a different *gotra*, would according to the Bombay decisions take an absolute interest; but a widow, mother and grandmother who are of the same *gotra* with the propositus would simply be entitled to what we have described above as the peculiar estate. In Bombay therefore where several daughters or sisters inherit together, they have a right to partition and the principles of survivorship do not obtain. You have elsewhere learnt that this

* *Rinda Bai v. Anacharya* (1890) I. L. R. 15 Bom. 206

† *Vijjalangam v. Lakshuman* 8 Bom. H. C. Rep., O. C. 244; *Hari Bhat v. Damodar Bhat* (1878) I. L. R. 3, Bom. 171; *Bulakhi Das v. Keshav Lal* (1881) I. L. R. 6 Bom. 85; *Bhagirathi Bai v. Kahnui Rav* (1886) I. L. R. 11. Bom. 285 F. B.

peculiar estate of a female heir is more than a life estate, that for legal necessity the holder of the peculiar estate can create an absolute estate, and that the powers of the holder of this peculiar estate fall short of those of an absolute owner, in that she cannot at will dispose of the property by sale, gift or devise, as an absolute owner should be able to do; and I presume you also know what is meant by legal necessity for which a widow can convey an absolute estate.

When a coparcenary is held under the Dayabhaga exclusively by female heirs, or partly by females and partly by males, in order that a purchaser for value (for a female can make a valid gift by way of relinquishment, only in favour of the next reversioner)* may acquire a valid title to the shares of the females, he must purchase for legal necessity. If he fails to prove the existence of legal necessity, his purchase holds good, only for the lives of the females whose interest he purchased.

**Sale for
legal neces-
sity.**

When the male and female members of a family governed by the Dayabhaga live together as a joint family under the management of one of themselves, the manager generally performs all acts necessary for the well-being of the family, as if he were the constituted agent of the members. Now, as the powers of a female, in dealing with the family-property, would be limited, the manager as her agent would not have higher powers.

We have seen that minor co-sharers are generally represented by their elders who act as their guardians. Sometimes these elders constitute themselves as the guardians and then their actions, unless shown to be grossly negligent, bind the

**Guardians
& Wards
Act.**

* *Nobokishore Sarma Roy v. Hari Nath Sarma Roy* (1884) I. L. R., 10 Cal. 1102 F. B.

Sec. 29 Act
VIII of 1890.

Lease in
respect of a
minor's
share by
manager
along with
shares of
adults set
aside.

minors.* In other cases, Civil Courts in the exercise of the jurisdiction conferred on them by Act VIII of 1890 appoint guardians to protect the persons and property of minors, and then the minors are under the protection of Courts. Guardians appointed by the Courts have very limited powers conferred on them by Act VIII of 1890. Thus they have no power to sell any immovable property, or to grant a lease on behalf of their wards for any period exceeding five years. If it be necessary for them to grant leases for longer terms or sell properties, they can do so with the permission of the Court. As to the powers of guardians generally to bind their wards, the leading case is that of Hunooman Persaud Pande v. Mundraj Kunwaree (1856) 6 M. I. A., p. 393; 18 W. R. 81 note. In a case where the managing member of an undivided Dayabhaga family was the guardian appointed by Court on behalf of a minor co-sharer in the same family, a lease granted by him of an estate belonging to the joint family for a period exceeding five years without obtaining permission of the Court was set aside, as granted in excess of his powers. See Harendra Narain Singh Chowdhry v. Moran (1887) I. L. R., 15 Cal. 40.

* Nathuram v. Shoma Chhagan (1890) I. L. R., 14 Bom. 562.

LECTURE V.

Joint Property under Mahomedan Law.

Joint property among Mahomedans—Shares definite—Males and females inherit together—female heirs have same powers as male heirs—Mode of enjoyment determined by contract—Living in joint families after Hindu style—Assets and liabilities joint when they so live—How partition is to be effected in such cases—No presumption that acquisitions by members of families are for family—What is partition among the Mahomedans—Purchaser from a sharer acquires the share—acquires the right to partition—Pre-emption—Justice Mahmud's definition—Justice D. N. Mitter's definition—Pre-emption among three classes of persons—Pre-emptor must be absolute owner—Hindu widow can pre-empt—Beneficial owner in *benami* purchase cannot pre-empt—Pre-emption among Hindus—Mahomedan law determines incidents of pre-emption among Hindus and Mahomedans—Pre-emption only where Mahomedan influence prevailed—*Wajib-ul-urs*—Pre-emption among Hindus founded on and co-extensive with Mahomedan law—Preliminary forms—Reason of observance of forms—Pre-emption even among ancient Hindus—Pre-emption among Hindus in different districts—Pre-emption not confined to cases of Mahomedan co-sharers or Mahomedan vendees—*Wajib-ul-urs*—Conditions under which pre-emption arises—absolute sale—in conditional sale—Sale must be complete—Sale in liquidation of dower—not in cases of gift, charity, inheritance or bequest—Sale must be exchange of property for property—No pre-emption against purchase by co-sharer—Pre-emptor must be a co-sharer without partition.—Sharer in substance has the prior right—next to him sharer in appurtenances—Next to him the neighbour—Companion in way has superior claim to companion in channel of water—So also the owner of land which supplies irrigation over a neighbour—Right of special and general partners—Party-wall—Pre-emptor must take whole property sold—except when two persons purchase under same document—or when a co-sharer and a stranger together purchase—or when property sold consists of distinct plots—Co-sharers of same class owning unequal shares pre-empt equally—in case of absent co-sharers—Preliminaries to be observed for perfecting the right—First demand—Delay is dangerous—Second demand—Strict observance of forms necessary—Suit for pre-emption—Limitation—Valuation—Parties to suit—Not necessary to deposit price—Court to determine price bargained for and not market-price—Onus of proof—Resignation must

be before decree in order that co-sharer may benefit—Pre-emptor claiming in one capacity cannot succeed in another—Loss of right by latches—ceremonies may be performed by agent—When right which had accrued ceases—right revives upon correct information as to price, purchaser, or thing sold—resignation must be after accrual of right—Improvements made by purchaser—pre-emptor entitled to deduction of price if property be deteriorated by purchaser—pre-emptor acquires free of encumbrances created by purchaser—Pre-emption in auction sale—Form of decree in pre-emption suit—Time for payment of price to be fixed in decree—Pre-emptor not entitled to mesne profits—pre-emption among Shias only between two co-sharers.

Joint property among Mahomedans.

Shares definite.

Males and females inherit together.

Female heirs have same powers as male heirs.

Mode of enjoyment determined by contract.

Among the Mahomedans joint property is either the result of joint acquisition by the owners or the result of joint succession to the estate of a deceased relative. In either case the shares of the owners are definite and known prior to actual partition.

Now the Mahomedan law of inheritance allows both males and females to inherit simultaneously. The result is that coparcenaries with both male and female coparceners come into existence as in a Dayabhaga family, with this difference, that, whereas under the Dayabhaga, female heirs cannot be absolute owners of their shares, under the Mahomedan Law there is no restriction in the powers of female heirs to deal with their shares in any way they please.

Among the Mahomedans the mode of enjoyment of joint property oftentimes depends upon contract, express or implied. What we frequently find is that upon the opening out of a succession, the heirs, without effecting a partition by metes and bounds, allow the joint property to remain under the management of a common manager, frequently one of themselves, and divide the nett income after defraying all expenses in connection with the property according to their several shares. Such a state of things may be followed by a perfect partition by metes and bounds.

In several instances the co-heirs with their relations and dependants live together in the enjoyment of joint property, which perhaps is all they can call their own, much in the style in which Hindus live in joint families, without preserving any accounts of their separate expenditure and income. In such cases the expenses of maintenance, marriages and education are defrayed according to actual requirements from out of the total income. If during the continuance of this state of things any liabilities are incurred, any savings effected, or any estates purchased with such savings, it is only reasonable that such liabilities, savings or estates should be divided among the owners at a general partition according to their original shares. Indeed, any other mode of division may be not only impracticable for want of accounts, but also unfair to some of the co-sharers. This mode of living appears to have been imitated by the Mahomedans in some places from their Hindu brethren.

Living in joint family after Hindu style.

Assets and liabilities joint when they so live.

How partition is to be effected in such cases.

By what I have said above, I by no means intend to convey that as a rule the Mahomedans, wherever they live in joint families, live after the Hindu style. The contrary is the general state of things, and if they live in family groups, they live like joint boarders in order to keep down their expenditure—their mutual liabilities being determined in each case by special contract. Accordingly in the case of *Hakim Khan v. Gool Khan* (1882) 1. L. R. 8 Cal. 826; 10 C. L. R. 603 the Judges declined to presume that acquisitions made by the members of a Mahomedan family were for the benefit of the joint family. In *Abdool Adood v. Mahomed Makmil* (1884) 1. L. R. 10 Cal. 562 it was contended that though the property stood in the name of one member of a Mahomedan joint family, the presumption was that it was the

No presumption among Mahomedans that acquisitions by members of family are for family.

property of the family. But M'cDonell and Field J. J. held that the presumption had no place in a Mahomedan family.

You will observe that under the Mahomedan law, as under the Dayabhaga the jointness of the property consists only in the same tangible thing or incorporeal right being the subject of ownership by several individuals otherwise the rights of the owners are distinct. In such a case the result of a partition is only to mark out separate portions of the property, and allot such portions to the exclusive use and enjoyment of the separate owners. Even in the absence of a partition any of the joint owners can transfer his share by sale. The share of the owner being definite and known, the purchaser acquires that share. By his purchase he becomes entitled to joint possession with the remaining co-sharers and can also demand partition by metes and bounds.

One of the incidents of joint immovable property under the Mahomedan law is the right of pre-emption (*shoofa*) which a *shureek*, (partner in the substance of the thing) or a *khuleet* (partner in its appurtenances and appendages) possesses under certain circumstances. Mr. Justice Mahmud in *Gobind Dayal v. Inayatullah* (1885) I. L. R. 7 All. 775 (see p. 799) defines pre-emption thus "Pre-emption is a right which the owner of certain immovable property possesses as such, for the quiet enjoyment of that immovable property, to obtain, in substitution for the buyer, proprietary possession of certain other immovable property, not his own, on such terms as those on which such latter immovable property is sold to another person." In *Kudratulla v. Mahini Mohan Shaha* (1869) 4 B. L. R., F. B. 134, Mr. Justice Dwarkanath Mitter said that "a right of pre-emption was nothing more than a mere right of

What is
partition
according
to Maho-
medan Law.

Purchaser
from a
sharer ac-
quires the
share.
Acquires
the right
to partition.

Pre-emp-
tion.

Justice
Mahmud's
definition.

Justice
D. N.
Mitter's
definition.

repurchase not from the vendor but from the vendee."

Under the Mahomedan law three classes of persons have the right to pre-empt: (1) the *shureek* or the partner in the land, (2) the *khulleet* or the partner in the right of way or of water-course appurtenant to the land, and (3) the *moola-sik* or contiguous neighbour. All these three classes of persons must be owners and not tenants of the property which gives rise to this right. Beharee Ram *v.* Shooobhudra (1868) 9 W. R. 455; Sakina Bibi *v.* Amiran (1888) I. L. R. 10 All. p. 472. A Hindu widow, fully representing the estate, has been held entitled to the right of pre-emption. Phulman Rai *v.* Dani Kuari (1877) I. L. R. 1 All. 452; but see Dila Kuari *v.* Jagarnath Kuari (1883) I. L. R. 6 All. 17. Karan Sing *v.* Muhammad Ismail Khan (1878) I. L. R. 7 All. 860. A secret purchase *benami* does not constitute the purchaser a co-sharer. Beni Shankar Shelhat *v.* Mahpal Bahadur (1887) I. L. R. 9 All. 480. But in the present Lectures on joint property we are concerned only with the first two classes—the *shureek* and the *khulleet*.

Though this right owes its origin to the Mahomedan law, the principle on which it is established, *viz.*, the prevention of disagreement arising from having a bad neighbour or from partnership, is generally applicable, and even more so, to Hindus on account of their division into castes than to Mahomedans. There being no provision in the Hindu law, wherever this right exists among the Hindus by reason of long established usage, its incidents are* determined according to the Mahomedan law, unless long established

Presumption among three classes of persons.

Pre-emptor must be absolute owner.

Hindu widow can pre-empt.

The beneficial owner in *benami* purchase cannot pre-empt.

Mahomedan law determines incidents of pre-emption among Hindus and Mahomedans.

* See Gordhandas Girdharbhai *v.* Prankor (1869) 6 Bom. H. C. Rep. 263; Fakir Rawot *v.* Emambaksh (1863) B L. R. Sup. Vol. p. 35; W. R., F. B., 143.

custom makes the incidents different. In this connection allow me to observe that it is a noticeable fact that in Bombay and Madras where the Mahomedan influence was the least, we find no trace of this right. In *Deokinandan v. Sriram* (1889) I. L. R., 12 All. 234 Mr. Justice Mahmud one of the judges composing the Full Bench said (see p. 266).

Pre-emption
only where
Mahomedan
influence
prevailed.

"Among those facts is a proposition which cannot be controverted, and which apparently was not pressed upon the attention of the learned judges forming the majority of the Full Bench from whom Mr. Justice Roberts dissented, that as a matter of fact and not one of theoretical surmises or hypotheses, the right of *shufa* or pre-emption is unknown in those parts of India where Mahomedan jurisprudence had not in days gone by had full sway, and where Mahomedan influence was not felt as vigorously as in this part of the country and other parts of Upper India, in Bengal and in some parts of the Bombay Presidency such as Guzarat. For instance it is unknown in the Madras Presidency, where the High Court in *Ibrahim Saib v. Muni Mir Udin Saib* (1870) (6 Mad. H. C. R. 26) have gone the length of holding that even in the case of Muhammadans the doctrine of pre-emption is not law in that Presidency. Similarly in such parts of the Bombay Presidency as have not been subject to Muhammadan influence, the right of pre-emption does not prevail, and where it is found to prevail it has been distinctly held to prevail among the Hindus on no basis other than their acceptance of the Muhammadan rule of pre-emption. For this the case of *Gordhandas Girdharbhai v. Prankor* (6 Bom. H. C. R. 263) is a distinct authority. That was a case entirely between Hindus, and the learned judges after stating that there had been

many cases disposed of by the Sadar Diwani Adalat of that Presidency, went on to say—"There is no doubt that the custom in Guzarat is the Mahammadan right of pre-emption, or *hak shufa*; and therefore that in deciding such a suit as the present, it is to the particulars of that law we must look for guidance."

"If it were a correct proposition to maintain that the law of pre-emption as contained in the *Wajib-ul-urz* is an offshoot of the Hindu law relating to joint undivided Hindu families, I should have expected that in other parts of the country also, such as Madras and Bombay, where that law has had uninterrupted and full operation, a similar doctrine of pre-emption might have been evolved by village communities and joint Hindu families. But there is no contention that any such evolutionary phenomenon has taken place, and its absence is all the more remarkable because so far as the joint Hindu family system is concerned, those parts of the country are governed by the Mitakshara School of Hindu law in common with this part of the country. Equally remarkable is the circumstance that in none of the numerous cases to be found in the printed reports has any attempt been made to engraft on to the right of pre-emption the analogies of the Hindu law relating to legal necessity for alienations and other similar doctrines as understood in that law. It is also a fact which must not pass unobserved that so far as the pre-emptive clauses in this part of the country are concerned, village communities which have entered those clauses are as often mixed communities of Hindus and Muhammadans as they are unmixed Hindu or Muhammadan communities, and yet in the vast majority of cases of pre-emption which come before this Court the terms of the pre-emptive clause

are similar, and this fact, upon the hypotheses of the majority of the Full Bench, leads to the conclusion either that a Hindu law of pre-emption which never existed or an evolutionized form of the Hindu law as to joint undivided families, was adopted by the Muhammadans in such cases, an evolution which has not yet been recognized even by Hindus themselves in respect of sales of joint immovable property such as houses and other buildings."

In *Fakir Rawot v. Emam Baksh* (1863) B. L. R. Sup. vol. 35; W. R., F. B. 143, Sir Barnes Peacock, in delivering the judgment of the Full Bench, said: "We, therefore, think the established law upon this subject is clear enough, that a right or custom of pre-emption is recognised as prevailing among Hindus in Behar, and some other provinces of Western India; that in districts where its existence has not been judicially noticed, the custom will be matter to be proved; that such custom, when it exists, must be presumed to be founded on and co-extensive with the Mahomedan law upon that subject, unless the contrary be shown; that the Court may, as between Hindus, administer a modification of that law as to the circumstances under which the right may be claimed, when it is shown that the custom in that respect does not go the whole length of the Mahomedan law of pre-emption, but that the assertion of the right by suit must always be preceded by an observance of the preliminary forms prescribed in the Mahomedan law, which forms appear to have been invariably observed and insisted on through the whole of the cases from the earliest times of which we have record. In this requirement we see no evil, in as much as a right of pre-emption, undoubtedly, tends to restrict the free sale and purchase of property, and it is desirable,

Pre-emption among Hindus founded on and co-extensive with Mahomedan law.

Preliminary forms.

Reason of the observance of forms.

therefore, to encompass it with certain rules and limits lest the right should be exercised vexatiously." In *Hira v. Kallu* I. L. R. 7 All. 916 (1885) it was held that among Hindus the right was founded on contract or custom and that where it was founded on contract or agreement it ceased on a transfer to a stranger to the agreement. Professor Jolly in his Lectures (p. 89) says: "There exists also a trace of a right of pre-emption among the members of one village in a text (Mit. ch. I sec. I, v 31) which declares the assent of townsmen, of kinsmen, of neighbours and of heirs as requisite for any transfer of landed property." In *Joy Koor v. Suroop Narain Thakoor* W. R. (1864) p. 259; *Sheojuttun Roy v. Anwar Ali* (1870) 13 W. R. 189; and *Ramdular Misser v. Jhumack Lal Misser* (1872) 17 W. R. 265, 8 B. L. R. 455 it was held that the custom of pre-emption was recognized among Hindus in the province of Behar. In *Surdharee Lall v. Laboo Moodee* (1876) 25 W. R. 499 the existence of the custom was recognized in Bhagulpur. In *Gordhan Das Girdhar Bhai v. Prankor* (1869) 6 Bom. H. C. Rep. A. C. 263 the existence of the custom was recognized in Guzerat and it was held that the custom was regulated by the Mahomedan law. In *Akhoyram Shahgee v. Ramkant Roy* (1871) 15 W. R. 223 it was admitted that in the district of Sylhet the custom existed. In *Ibrahim Saib v. Muni Mirudin Saib* (1870) 6 Mad. H. C. Rep. 26 it was held that the Mahomedan law of pre-emption did not apply to Madras. In *Gobind Dayal v. Inayatullah* (1885) I. L. R. 7 All. 775 the Judges of the Allahabad Court held that the Mahomedan law was applicable not only where the vendor and vendee were Mahomedans but also where the vendor was a Mahomedan and the vendee non-Mahomedan. Nor need the pre-emptor be a Mahomedan. Baillie

Pre-emption even among ancient Hindus.

Pre-emption in different districts.

Pre-emption not confined to cases of Mahomedan co-sharers or Mahomedan vendees.

in his Digest on Mahomedan law says:—"Islam on the part of the pre-emptor is not a condition, so that *zimmes* are entitled to the right of pre-emption as between themselves or against Mooslims."

In Bengal it has been held that where the pre-emptor and the seller are Mahomedans and the purchaser a Hindu, the Mahomedan law of pre-emption should not be applied to deprive the Hindu of his purchased right. *Shekh Kudratulla v. Mahini Mohan Shaha* (1869) 4 B. L. R., F. B. 134; 13 W. R., F. B. 21. But a Full Bench of the Allahabad Court has held otherwise. *Gobind Dayal v. Inayat-ullah* (1885) 1. L. R. 7 All. 775.

From what has been said above it is clear that we have to consider the Mahomedan law of pre-emption as regards partners in substance and partners in the appurtenances and our observations will be applicable both to the Mahomedans and Hindus.

Wajib-ul-urz.

But before discussing the law let me state to you that in several villages in the N.-W. Provinces we find *Wajib-ul-urz* providing for the various circumstances under which the right is to accrue in those villages. You may refer to the following cases which contain mentions of such documents.

(1) *Gokal Sing v. Mannu Lal* (1885) 1. L. R. 7 All. 772.

(2) *Shiam Sundar v. Amanant Begam* (1887) 1. L. R. 9 All. 234.

(3) *Balwant Singh v. Subhan Ali* (1887) 1. L. R. 10 All. 107.

(4) *Khuman Singh v. Hardai* (1888) 1. L. R. 11 All. 41.

(5) *Kuar Dat Prasad Singh v. Nahar Sing* (1888) 1. L. R. 11 All. 257.

(6) *Safdar Ali v. Dost Muhammad* (1880) 1. L. R. 12 All. 426.

(7) *Jasoda Nand v. Kandhaiya Lal* (1891) I. L. R. 13 All. 373.

The report of this last case contains translation of a *Wajib-ul-urş*. In all cases where the conditions upon which the right is to arise have been reduced to writing, the right would arise only upon the happening of the contingencies contemplated in the document. Under such an instrument the right may arise not only upon a sale but also upon a mortgage or lease, and the observance of formalities may be dispensed with. *Zamir Husain v. Daulat Ram* (1882) I. L. R. 5 All. 110.

The right of pre-emption under the Mahomedan law arises under the following conditions:—

(1) There must be a sale out and out without any conditions.* In *Dewanūtulla v. Kazem Molla* (1887) I. L. R. 15 Cal. 184 it was held that where a co-proprietor did not part with his entire interest in land by an absolute sale, but merely granted a lease of it, even though it might be a mourasi lease, the right of pre-emption would not arise. In *Ajaib Nath v. Mathura Prasad* (1888) I. L. R. 11 All. 164 and *Digambur Misser v. Ram Lal Roy* (1887) I. L. R. 14 Cal. 761 it was held that in the case of a conditional sale, the right of pre-emption would not arise until the foreclosure proceedings made the sale absolute, and that acquiescence in a mortgage by conditional sale would not deprive the pre-emptor of his right to pre-empt when the sale became absolute. See also *Gurdial Mundar v. Tek Narayan Singh* (1865) B. L. R. Sup. Vol. p. 166; 2. W. R. 215. *Hazari Ram v. Shankar Dial* (1881) I. L. R. 3 All. 770. *Tara Kunwar v. Mangri Meea* (1871) 6 B. L. R. Ap. 114. In *Buksha Ali v. Tofer Ali* (1873) 20 W. R. 216 and *Janki v. Girjadas* (1885)

Conditions under which pre-emption arises.

(1) Absolute sale.

In conditional sales.

Sale must be complete.

* *Ladun v. Bhyro Ram* (1867) 8 W. R. 255. *Ram Golam Singh v. Nursing Sahoy* (1875) 25 W. R. 43.

Sale in liquidation of dower.

I. L. R. 7 All. 482 it was held that the sale must be complete before the right can arise. In *Fida Ali v. Muzaffar Ali* (1882) I. L. R. 5 All. 65 it was held that a sale to a wife in liquidation of a portion of her dower was within the meaning of this condition. It follows that in the case of gift, charity, inheritance or bequest this right does not arise, though if the gift be *heba-ba-shurt-ool-iwaz* or with a condition that something should be given in exchange, and mutual possession is taken the right arises.

Not in cases of gift charity inheritance or bequest.

(2) Sale must be exchange of property for property.

(2) "The sale must be an exchange of property for property. So if one should emancipate a slave in exchange for a mansion there is no right of pre-emption" Baillie. Sale is defined to be exchange of property for property by consent of parties, and therefore where property was transferred for dower the right of pre-emption arose. *Fida Ali v. Muzaffar Ali* (1882) I. L. R. 5 All. 65. In such cases the consideration payable by the pre-emptor is the estimated value of the property given in exchange. *Sewaram v. Risal Chowdhry* 1 Agra 144.

(3) No pre-emption against purchase by co-sharer.

(3) The purchaser must not himself be a co-sharer with the seller; that is, the pre-emptor cannot claim the right against a purchaser who is a co-sharer like himself. *Nowbut Lall v. Jewan Lall* (1878) I. L. R. 4 Cal. 831; 2 C. L. R. 319. In this connection it should be noted that as regards the right of pre-emption any kind of actual partition, private or public, is looked upon as complete severance. *Digambur Misser v. Ram Lal Roy* (1887) I. L. R. 14 Cal. 761.

(4) Pre-emptor must be a co-sharer.

(4) The pre-emptor must be a co-sharer of the vendor. When therefore there has been a separation between the pre-emptor and the vendor, the former would have no claim to pre-empt. The separation here contemplated seems to be separa-

tion by metes and bounds. Hedaya Vol. III p. 563 says: "When there has been a division and the boundary of each partner is particularly discriminated, the right of a *shuffa* can no longer exist." Gureeboola Khan *v.* Kebul Lall Mitter (1870) 13 W. R. 125; and Koromali *v.* Amir Ali (1868) 3 C. L. R. 166. A co-sharer by associating himself with a stranger forfeits his right of pre-emption. Bhawani Persad *v.* Dainree (1882) 1. L. R. 5 All. 197.

Of the three classes of persons entitled to the right of pre-emption, a sharer* in the substance is preferred to one who is only a sharer in the rights and appurtenances of the lands; and he again to one who is only a neighbour. Should the sharer in substance give up his claim, the right of the sharer in appurtenances would arise, and should the sharer in appurtenances resign, the right of the neighbour would accrue. But the sharer must be one between whom and the seller there has not been a complete severance. See Byjnath Sing *v.* Dooly Mahtoon (1869) 11 W. R. 215; Gurreeboollah Khan *v.* Kebul Lall Mitter (1870) 13 W. R. 125.

Sharer in substance has the prior right.

Next to him sharer in appurtenances.

Next to him the neighbour.

"Among partners in appurtenances, a companion in a way is preferred for pre-emption to a companion in a channel of water when the place of the channel is not his property." Baillie p. 480.

So also the owner of the land from which waters for irrigation are received has a preferential right of pre-emption to a mere neighbour. Chand Khan *v.* Naimat Khan (1869) 3 B. L. R., A. C., 296; 12 W. R. 162.

Baillie, in his Digest on Mahomedan Law, in illustrating what has been said above, says

* Golam Ali Khan *v.* Agurjeet Roy (1872) 17 W. R. 343.

“Take the case of a mansion which is situate in a street without a thoroughfare, and belongs to two persons, one of whom sells his share. The right of pre-emption belongs, in the first place, to the other partner in the mansion. If he surrenders his right, it belongs to the inhabitants of the street equally, without any distinction between those who are contiguous and those who are not so; for they all are *khulleets* in the way. If they surrender the right, it belongs to a *moolasik*, or contiguous neighbour. If there be another street leading from this street, and having no passage through it, and a house in it is sold, the right of pre-emption belongs to the inhabitants of this inner street, because they are more specially intermixed with it than the people of the other street. But if a house in the outer street be sold, the right of pre-emption belongs to the people of the inner as well as to those of the outer street, for the intermixture of both in the right of way is equal. If the street were open, with a passage through, and a mansion in it were sold, there would be no right of pre-emption except for the adjoining neighbour. In like manner, when there is a thoroughfare which is not private property, between two mansions (that is, when they are situate on opposite sides of the way), and one of them is sold, there is no pre-emption, except for the adjoining neighbour. If the road be private property, it is the same as if it were no thoroughfare. A thoroughfare which does not give the right of pre-emption is a street that the people residing in it have no right to shut. In like manner as to a small channel from which several lands or several vineyards are watered, and some of the lands or some of the vineyards watered by it are sold:—all the partners are pre-emptors, without any distinction between those

who are and those who are not adjoining. But if the channel be large, the right of pre-emption belongs to the adjoining neighbour."

Of partners in the substance a special is always preferred to a general partner. Thus if within a mansion belonging to several owners there is a house belonging to two persons and one of them sells his share in it, the right of pre-emption belongs first to the partner in the house and then to the partner in the mansion. So if there is a party-wall between two houses* and the land on which the wall stands belongs to the owners of both houses, the right of pre-emption arises when one of the houses is sold to a stranger. But unless the land on which the wall stands is the joint property of the owners of the houses, they would not be partners though they may be neighbours.

Rights of a special and a general partner.

Again a partner in the substance or in the appurtenances must as a rule claim the right of pre-emption in respect of *all* that is sold, or bargained to be sold, to a stranger. It would not be competent to him to claim the right in reference to a portion only of the subject of sale. *Izzatulla v. Bhikari Molla* (1870) 6 B. L. R. 386; 14 W. R. 469; *Kashinath v. Mukhta Prasad* (1884) 1. L. R. 6 All. 370. In *Doorga Prasad v. Munsu* (1884) 1. L. R. 6 All. 423 the Court on the authority of earlier cases held that every suit for pre-emption must include the whole of the property subject to the plaintiff's pre-emption conveyed by one bargain of sale to one stranger, and a suit by a plaintiff pre-emptor which does not include within its scope the whole of such pre-emptional property is unmaintainable, as being inconsistent with the nature and essence of the

Pre-emptor must take whole property sold.

* *Prag Dutt v. Bandi Hossein* (1871) 7 B. L. R. 42; 15 W. R. 225 and on review *Bundey Hossein v. Puriag Dutt* 16 W. R. 110.

Except
when two
persons
purchase
under same
document.

Or when a
co-sharer
and a stranger
together
purchase

pre-emptive right. This case was followed in *Hulasi v. Sheo Prasad* (1884) I. L. R. 6 All. 455. To the same effect see *Arjun Sing v. Sarfaraz Sing* (1888) I. L. R. 10 All. 182; *Muhammad Wilayat Ali Khan v. Abdul Rab* (1888) I. L. R. 11 All. 108; and *Surdharee Lall v. Laboo Moodee* (1876) 25 W. R. 499. The only exceptions to this rule are (1) where two persons purchase from one under the same document and (2) where the purchase is made by a co-sharer conjointly with a stranger. In the first of these cases, the pre-emptor can obtain the share of one of the two purchasers, and in the second case if the purchase of the stranger can be separated, he can have the share purchased by the stranger. *Sheobharos Rai v. Jiach Rai* (1886) I. L. R. 8 All. 462.

In *Hargas v. Kanhya* (1884) I. L. R. 7 All. 118 the Offg. Chief Justice Straight is reported to have said. "If a co-sharer associates a stranger with him in the purchase of a share, another co-sharer is entitled to pre-empt the whole of the property sold, but it is not obligatory upon him to impeach the sale so far as the co-sharer-vendee is concerned; for, it may well be that he has no desire to exclude such co-sharer."

When a stranger conjointly with a sharer makes a purchase, the joining co-sharer loses his right of pre-emption. *Saligram Sing v. Raghubar Dyal* (1887) I. L. R. 15 Cal. 224.

Co-sharers
of same
class own-
ing unequal
shares
pre-empt
equally.

Under the Mahomedan law* co-sharers of the same class irrespective of the extent of their shares are equally entitled to the right of pre-emption. Thus if A, B, C and D be the joint owners† of a property—their shares respectively

* *Hedaya* Vol. III pp. 562-567.

† *Moharaj Sing v. Lalla Bheechuck Lall* 3 W. R. 71; *Roshun Mahomed v. Mahomed Kaleem* 7 W. R. 150; *Nundo Pershad Thakur v. Gopal Thakur* (1884) I. L. R. 10 Cal. 1008.

being as the fractions $\frac{1}{2}$, $\frac{1}{4}$, $\frac{1}{8}$ and $\frac{1}{8}$ —and if A who is entitled to a moiety contract to sell his share to a stranger, then B, C and D will each be entitled to claim the right of pre-emption *equally* and unless any one of them surrenders his right they will each obtain $\frac{1}{6}$ th share of the property though their own shares in the property are not equal. So if B surrenders his right before decree, C and D will each obtain a fourth share.

If some of the sharers happen to be absent, the right of pre-emption belongs to those who are present, because it is uncertain whether those who are absent are inclined to make use of their right; but when the absent sharers afterwards appear and claim their share, they are entitled to it.*

In case of
absent co-
sharers.

The Mahomedan law enjoins the performance of certain preliminaries as essential to the completion of the right, and these must be performed, except where the *Wajib-ul-urz* dispenses with the observance of any of these formalities. See *Ram Prasad v. Abdul Karim* (1887) I. L. R., 9 All. 513.

Prelimina-
ries to be
observed
for perfect-
ing the
right.

The right of pre-emption *commences* when the seller declares his intention to sell, though it cannot be enforced until *after* the sale. *Gobind Dayal v. Inayatullah* (1885) I. L. R. 7 All. 775. If the vendor does not then inform his co-sharers, they are entitled to enforce their right as soon as it becomes known to them that the property has been sold. The first duty† of the pre-emptor is to claim his right *immediately* on learning of the sale. The Mahomedan law is so particular in this respect, that the Hedaya provides,

When the
right com-
mences.

First de-
mand.

* Hedaya Vol. III pp. 562-7.

† *Jhootee Sing v. Komul Roy* (1868) 10 W. R. 119; *Jarfan Khan v. Jabbar Meah* (1884) I. L. R. 10 Cal. 383; *Ali Muhammad v. Taj Muhammad* (1876) I. L. R. 1 All. 283; *Ram Charan v. Narbir Mahton* (1870) 4 B. L. R., A. C. 216; 13 W. R. 259.

Delay is dangerous.

that "if a pre-emptor receives the information of a sale by letter, and the information is contained in the beginning or middle of the letter, and he reads it on to the end and without making his claim, the right is lost." In *Amjad Hossein v. Kharag Sen Sahu* (1870) 4 B. L. R., A. C. 203; 13 W. R. 299 a little delay which was necessary to ascertain if the sale had really taken place was allowed not to interfere with the right. This first demand is called "*tulub-moorwathubut*." If when the first demand is made, witnesses be present and the demand made in the presence of the purchaser, or seller, or of the premises which are the subject of the sale, the pre-emptor should ask these witnesses to attest his demand.

Strict observance of forms necessary.

After the first demand has been made whether in the presence of witnesses or not, the pre-emptor should as early as practicable make what is known as *tulab-ish-had* (or demand with the invocation of witnesses) also called *tulub-tukreer* or confirmatory demand.* This second demand should be made in the presence of witnesses and in the presence of the seller or purchaser† or of the property sold. No particular‡ form of words is necessary for the demand. The pre-emptor may say "I do demand pre-emption of such premises (giving boundaries or other description). Bear ye testimony; I have performed

Second demand.

* *Narbhase Sing v. Luchmee Narain Pooree* (1869) 11 W. R. 307. *Razeeoodeen v. Zeenut Bibee* (1867) 8 W. R. 463; *Prokas Sing v. Jogeswar Sing* (1868) 2 B. L. R., A. C. 12; *Jadu Sing v. Raj Kumar* (1870) 4 B. L. R., A. C. 171; 13 W. R. 177; *Nuraddin Mahomed v. Asgar Ali* (1882) 12 C. L. R. 312; *Jamilan v. Latif Hossein* (1871) 8 B. L. R. 160; 16 W. R., F. B. 13.

† *Janger Mahomed v. Mahomed Arjad* (1879) 1 L. R. 5 Cal. 509; 5 C. L. R. 370. *Chamroo Pasban v. Puhlwan Roy* (1871) 16 W. R. 3.

‡ *Ram Dular Misser v. Jhumack Lal Misser* (1872) 8 B. L. R. 455; 17 W. R. 265; *Girdharee Sing v. Rojun Sing* (1875) 24 W. R. 462; *Imam-uddin v. Shah Jan Bibi* (1870) 6 B. L. R. 167 note—*Rujjubali Chopedar v. Chundi Churn Bhadra* (1890) 1 L. R. 17 Cal. 543

the ceremony of *tulub-moowathubut*" or words to that effect.

If the pre-emptor should make any delay in declaring his intention, he loses his right. See *Ali Muhammad v. Taj Muhammad* (1876) I. L. R. 1 All. 263; *Bhairon Singh v. Lalman* (1884) I. L. R. 7 All. 23; *Surdharee Lall v. Laboo Moodee* (1876) 25 W. R. 499. In *Koromali v. Amir Ali* 3 C. L. R. 166 where the first demand was made in the presence of the purchaser, the seller and the purchased premises, and with invocation of witnesses, the Court held that the second demand was not necessary. See also *Jadunundun Singh v. Dulput Singh* (1884) I. L. R. 10 Cal. 581.

Should the seller or the purchaser object to the pre-emptor's right, the pre-emptor must enforce his claim by an action, and under the Mahomedan law the action must be instituted within a month of the time when the pre-emptor first became aware of the sale. But under the Limitation Act, (and in this respect the provisions of the Limitation Act and not the Mahomedan law will determine the period), the pre-emptor has a year* from the registration of the conveyance, or, the taking of possession by the purchaser, within which to prefer his claim in a court of justice.

A suit for pre-emption ought to be valued for purposes of jurisdiction at the value at which the property has been sold. *Naun Singh v. Rash Behari Singh* (1886) I. L. R., 13 Cal. 255. To such a suit the defendants should be the seller and the purchaser, and the plaintiff should prove his right as co-sharer in the substance or in the appurtenances, as the case may be. He should also prove that the purchaser purchased the property for the price ascertained by him

Suit for pre-emption.

Limitation.

Valuation.

Parties to suit.

* Act XV of 1877 Sch. II. Art. 10.

Not necessary to deposit price.

and express his willingness to take the property upon the same terms as the purchaser-defendant. It would not be necessary* for the pre-emptor to deposit the price into court on preferring his claim. It would be sufficient if he would pay it when his right has been declared by Court, or when the Court would require him to pay it. But if he fails to pay the price in strict compliance with the Court's order, he loses his rights under the decree. *Jai Kishn v. Bholanath* (1892) I. L. R. 14 All. 529.

Court to determine the price bargained for and not market price.

In several of these suits for pre-emption, a question arises as to whether in order to defeat the right of pre-emption a considerably higher price was not entered in the conveyance than what was actually paid or stipulated for. In such cases the Court is called upon to determine not what the market price of the premises in question should be, but what was the real price, for which the premises were contracted to be sold, or which was paid by the purchaser. Very slight proof need be given by the pre-emptor on this point. He is not expected to know what price was fixed upon between the buyer and the seller. If he gives evidence to show that the market price of the premises was considerably below the sum mentioned in the conveyance, the purchaser should be called upon to prove by strong evidence what price he actually paid or agreed to pay. On this point see *Bhagwan Singh v. Mahabir Singh* (1882) I. L. R. 5 All. 184; *Tawakkul Rai v. Lachman Rai* (1884) I. L. R., 6 All. 344; *Sheopargash Dube v. Dhanraj Dube* (1887) I. L. R. 9 All. 225; *Agar Singh v. Raghuraj Singh* (1887) I. L. R., 9 All. 471. In *Ajaib Nath v. Muthura*

Onus of proof.

* *Khoffeh Jan Bebee v. Mahomed Mehdee* (1868) 10 W. R. 211; *Heera Lall v. Moorut Lall* (1869) 11 W. R. 275; *Nundo Pershad Thakur v. Gopal Thakur* (1884) I. L. R. 10 Cal. 1008.

Prasad (1888) I. L. R., 11 All. 164 where the price was settled by compromise, it was held that the consideration payable by the pre-emptor was the amount specified in the compromise. In *Ashik Ali v. Mathura Kandu* (1882) I. L. R., 5 All. 187, where there was originally a mortgage by conditional sale, the court held that the entire amount due on the mortgage was the consideration payable by the pre-emptor.

We have seen that the rights of pre-emptors of the same class are equal and that if one of the pre-emptors resigns his right, such resignation enures to the benefit of the rest. All this can be done before decree. If the resignation by one co-sharer be made after decree, the entire share sold cannot be taken up by the other co-sharer but each of these latter must take according to the decree.

Resignation must be before decree in order that a co-sharer may benefit.

The same rule holds in the case of pre-emptors of different classes. Thus, we have seen that the right of a partner in substance is superior to that of a partner in the appurtenances, and that if a partner in substance should resign, the right of the partner in the appurtenances would arise. But no such benefit can accrue to the pre-emptors of the lower class, if the resignation be made after decree. So also a pre-emptor claiming in one right cannot get a decree in a different right. *Sheojuttun Roy v. Anwar Ali* (1870) 13 W. R. 189.

A pre-emptor may lose his right by laches* or by voluntary act. If he fails to comply with the preliminaries in due time he loses his right by laches. Sometimes also a pre-emptor is seen to give up his right of his own accord. He may do so by acquiescing in the sale, or by taking an agreement from the purchaser. *Habibunnissa v. Barkat Alli* (1886) I. L. R., 8 All. 275. .

Loss of right by laches.

* *Bhairon v. Lalman* (1884) I. L. R. 7 All. 23; *Habib-un-Nissa v. Barkat Ali* (1886) I. L. R., 8 All. 275.

Ceremonies may be performed by agent.

The ceremonies which have to be performed by a pre-emptor may be performed by an agent. *Wajid Ali Khan v. Hanuman Prasad* (1869) 4 B. L. R., A. C., 139; 12 W. R. 484; *Abadi Begam v. Inam Begam* (1877) I. L. R. 1 All. 521. In such cases the same effect should be given to the manager's acts and omissions as to the acts and omissions of the principal. *Harihar Dut v. Sheo Prasad* (1884) I. L. R. 7 All. 41.

When right which had accrued ceases.

The right according to the Mahomedan law ceases upon the death of the pre-emptor after the making of the two demands and before taking the premises under the pre-emption. For the same reason, the right ceases when the pre-emptor dies before decree; but if he dies after obtaining a decree and before paying the price or obtaining possession of the property, his heirs get the benefit of the decree and become responsible for the price (*Baillie's Digest* Vol. I p. 499).

Right revives upon information as to price, or thing sold.

In some cases the pre-emptor relinquishes his right upon misinformation of the price, the purchaser, or, the thing sold. If in such cases upon receipt of correct information, the pre-emptor should wish to enforce his right he would be at liberty to do so. But the onus would lie very heavily on him to prove his case of misinformation and *bona fides*. *Lajja Prasad v. Debi Prasad* (1880) I. L. R. 3 All. 236.

Surrender must be after accrual of right.

In order that a purchaser may reap the benefit of a surrender by the pre-emptor, such surrender must be shown to have been made after the accrual of the right of pre-emption. A surrender before a sale is not effective. But in *Braja Kishor Surma v. Kirti Chandra Surma* (1872) 7 B. L. R. 19; 15 W. R. 247, the correctness of the law was questioned by Justice Onoocool Chandra Mookerjee. On this point see *Toral Komhar v. Auchhi* (1873) 9 B. L. R. 253; 18 W. R. 401;

Kooldeep Singh *v.* Ram Deen Singh (1875) 24 W. R. 198; Abadi Begam *v.* Inam Begam (1877) I. L. R. 1 All. 521.

When the purchaser before the passing of the decree has made improvements on the property, the pre-emptor may either take them for their value, or allow the purchaser to remove them. In such cases if the improvements were made after the pre-emptor's demand was known to the purchaser, and if the removal of the improvements would deteriorate the land in value, it would be competent to the Court to order possession to be given to the pre-emptor with the improvements without his having to pay for them. A purchaser knowing of the demand should therefore abstain from incurring any expenditure on improvements. But if the property has been deteriorated in value by the purchaser, the pre-emptor would be entitled to a proportionate deduction in the value. (Baillie's Digest on Mahomedan Law p. 498.)

Pre-emptor entitled to deduction of price if property be deteriorated by purchaser.

The pre-emptor in ordinary cases in getting possession of the property would get it void of all encumbrances that may have been created on it by the purchaser. Were it otherwise, the purchaser might in several cases defeat the pre-emption. Nor is this principle likely to injure any party if the equities are properly worked out. The price paid for the property by the pre-emptor would represent the property and be a substitute for it, and if a *bona fide* mortgage had been created by the purchaser, such mortgage should be satisfied out of the price.

Pre-emptor acquires free of encumbrances created by purchaser.

When property is sold at a public auction, the pre-emptor, in order that he may have a valid right of pre-emption, must bid for the property at auction up to the highest amount for which it may be knocked down. See Tej Singh *v.* Gobind Singh (1880) I. L. R. 2 All. 850; and Hira *v.* Unas Ali

Pre-emption in auction sale.

Khan (1881) I. L. R. 3 All. 827. Section 310 of the Civil Procedure Code (Act XIV of 1882), which the Court had to consider in coming to the above conclusion runs in these words :—"When the property sold in execution of a decree is a share of undivided immovable property, and two or more persons of whom one is a co-sharer, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the co-sharer." But previous to the passing of the present Code, the law was otherwise. Thus, in *Abdul Jabel v. Khelat Chandra Ghose* (1868) 1 B. L. R., A. C. 105; 10 W. R. 165, the High Court of Calcutta had held that under Sec. 14, Act XXIII of 1861 a co-sharer had no right of pre-emption in case of public sale.

The right of pre-emption has been secured in several instances by statutes. Thus in the case of sales for arrears of revenue under the Land Revenue Act of N.-W. P. (Act XIX of 1873) a co-sharer may acquire the right of pre-emption under the provisions of Sec. 188 of the Act. *Baij Nath v. Sital Sing* (1890) I. L. R. 13 All. 224 also recognizes the right of pre-emption in sales for arrears of rent. You will find similar provisions in the Punjab Revenue Act XVII of 1887 Sec. 87.

Devices to
defeat pre-emption.

It is amusing to note the devices generally resorted to by sellers and purchasers to evade the right of pre-emption. Some of these have reference only to the rights of a neighbour. We have no concern with them. The devices frequently used to deprive co-sharers of their just rights are (1) to transfer properties under ostensible deeds of gift; (2) to overstate the price in the conveyance with a view to scare away the co-sharers; and (3) to sell under the same document other property with which the pre-emptor has no concern.

As to this last device, see *Rowshun Koer v. Ram Dihal Roy* (1883) 13 C. L. R. 45.

As to the form of decree in a suit for pre-emption, see the provisions of Sec. 214 of the Civil Procedure Code which runs as follows :—

Form of
decree for
pre-emption.

“When the suit is to enforce a right of pre-emption in respect of a particular sale of property, and the Court finds for the plaintiff, if the amount of purchase-money has not been paid into Court, the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase-money, together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property, but that if such money and costs are not so paid, the suit shall stand dismissed with costs.” See also

Kashinath v. Mukhta Prasad (1884) I. L. R. 6 All. 370 and *Parshadi Lal v. Ram Dial* (1880)

I. L. R. 2 All. 744. It is incumbent that a time

should be fixed in the decree for payment of the price. The Appellate Court may extend such

time *Parshadi Lal v. Ram Dial* (1880) I. L. R. 2

All. 744. See also *Rup Chand v. Shamshul Jehan*

(1889) I. L. R. 11 All. 346; and *Balmukand v.*

Pancham (1888) I. L. R. 10 All. 400. In *Naubat*

Singh v. Kishan Singh (1881) I. L. R. 3 All. 753 it

was held that a decree for possession in favour of

a pre-emptor might be made conditional upon his

paying a higher sum on account of the price than

what was first offered by him. In *Jai Kishen v.*

Bholanath (1892) I. L. R. 14 All. 529 it was held

that if the pre-emptor failed to pay the price within

the time mentioned in the decree he lost his right.

It should be noted that a pre-emptor would not be

able to claim the benefit of any arrangement as to

the payment of price by instalments made between

the vendor and the vendee. *Nihal Singh v. Kokale*

Singh (1885) I. L. R. 8 All. 29.

Time for
payment of
price to be
fixed in
decree.

**Pre-emptor
not entitled
to mesne
profits.**

In *Deodat v. Ram Autar* (1886) I. L. R. 8 All. 502, it was held that the vendee in possession could not be deemed a trespasser and that the pre-emptor would not be entitled to mesne profits from him. This principle was approved by the Full Bench in *Deokinandan v. Sri Ram* (1889) I. L. R. 12 All. 234. These cases laid down that the right of the pre-emptor to possession accrued from when he completed his purchase by payment of the price.

**Pre-emption
among the
Shiah sect
exists only
between
two co-
sharers.**

The prevalent doctrine of the Shiah sect is that no right of pre-emption exists in the case of property owned by more than two co-sharers. *Abbas Ali v. Mayaram* (1888) I. L. R. 12 All. 229.

LECTURE VI.

Joint Property generally.

Disputes as to mode of enjoyment are determined by partition—why co-sharers generally allow joint property to run into waste—Dread of partition suit—Division of subject—Contribution among co-sharers—Contract Act—Equitable doctrine—Jurisdiction of Small Cause Court—Under Act XI of 1865 after the passing of Contract Act—Under present Act—Under Presidency Small Cause Court Act—Payment of revenue secures no lien—When payment of rent in Bengal secures lien—Parties to contribution suits—Decree in such suit—Plaint to specify shares—Contribution among wrong-doers—among persons jointly liable for breach of contract—Repairs—Improvements—Injunction against co-sharers' use—No injunction except on proof of waste—*Watson & Co. v. Ram Chund Dutt*—*Lachmeswar Singh v. Manowar Hossien*—One joint proprietor without injuring his co-proprietors may use joint property so as to be entitled to exclusive profits—Buildings on joint lands—Acquiescence—reasonable rent where demolition would be a hardship—No demolition if practicable—An ordinary case in Bengal—Co-sharer growing valuable crop on joint land—Suit for *khás* possession by all co-sharers—Remedy of one dispossessed by a co-sharer—*In Bengal*—Enhancement of rent must be sued for by all joint landlords—Even where co-sharers collect their rents separately—Enhancement by a co-sharer to whom a separate *kubulyut* was given—Circumstances under which share of increased rent was held recoverable—Suit for determination of incidents of tenancies—one of several landlords may sue for apportionment of rent—Whether a co-sharer can sue for entire rent and when—When can a sharer sue for his share of rent separately—Tenure not saleable at the instance of one of several landlords—Apportionment of rent on land ceasing to be joint—Registration of sharers under Act VII B. C. of 1876—Suit for *kubulyut* by co-sharer—Enhancement of rent of a share by deed—Suit for ejectment of tenant by one of several landlords—mode of executing partial ejectment—Joint landlords under Bengal Tenancy Act—Common manager—Lease on behalf of a minor co-sharer void even as regards shares of adults—Private partition of Revenue-paying Estates not binding on Government—Partition of tenancies under Bengal Tenancy Act—Surrender by one of several tenants—opening of separate accounts under Act XI of 1859—*In N.-W. Provinces*—when co-sharers refuse settlement of *Pattidari Mahal*—Record of rights to determine the proportions in which Government

revenue should be paid by sharers and the mode in which rent is to be collected—Right of pre-emption possessed by co-sharer at sales for arrears of revenue—a co-sharer landlord cannot enhance rents—one of several tenants cannot surrender—one of joint tenants cannot be ejected by the landlord—no co-sharer to sue for portion of rent—circumstances in which one co-sharer can sue for share of rent—*Oudh Laws*—Joint settlement—Member of village community or co-sharer can obtain possession of defaulting share by payment of defaulter's revenue—tenant not competent to relinquish portion—suits for enhancement of rent, ejection of tenants &c. where the land is owned by several landlords to be brought by the common manager—*In Bombay*—a co-sharer as agent of the others can sue for rent—*In Punjab*—Joint liability of tenants for rent—*In Central Provinces*—settlement in case of a co-sharer refusing settlement—allowance of a sharer excluded from settlement—statutory pre-emption among sharers—Tenant not ordinarily bound to pay rent to one of several landlords—Common manager to collect rents—Property of a firm—Share of each partner—Partnership property primarily liable for partnership debts in preference to personal debts—Family idol. •

Heretofore we have discussed the special incidents of that class of joint property, which is the result of the personal laws of the people of India. Let us now consider some of the common incidents of joint property in general.

Disputes as to mode of enjoyment are determined by partition.

When a piece of land or a building belongs to a number of joint proprietors, disputes often arise among them in reference to the mode of enjoyment. Partition is the best means of putting an end to such differences, and we frequently find that the owners, who before partition, did not care to spend any money on the improvement of their joint property, do not hesitate to improve their separate allotments after partition.

Why co-sharers generally allow joint property to run into waste.

The secret of this oftentimes is that, comparatively larger sums have to be spent for the improvement of the entire property, and no individual sharer wishes to lay out such large sums which he may find very unpleasant to realize from his co-sharers. It is true that the sharers may, before undertaking the improvement, contribute

according to their shares, to raise the sum required ; but in the majority of cases, the comparatively needy circumstances of some of the share-holders stand in their way. Other causes also tend to check improvements of joint property.

But though under such circumstances the sharers may desire partition, the delay and the expenses incidental to an actual separation by metes and bounds by recourse to Court are sufficient to deter them from making an attempt in that direction. Unless, therefore, the co-sharers can agree among themselves as to separate allotments, or can avail themselves of the services of some common friends and mediators, they are obliged to continue in joint ownership. In this Lecture, I intend to consider some of the statutes, case-law and principles of equity which govern the relations of the co-sharers among themselves, and also those which regulate their rights and liabilities in reference to third persons.

Dread of partition suit.

Division of subject.

When rent or revenue has to be paid in respect of any joint property all the owners are jointly and severally liable for such rent or revenue. In a Mitakshara or a Dayabhaga joint family, where the owners have only one *tehvil* or purse, any payment made on account of such liability, from out of the common *tehvil* is a payment by all the owners, and no question of contribution arises. But when the owners have not a common *tehvil* and their interests in the land or property on account of which the rent or revenue is due, are, as among themselves, distinct, though the liability, for the rent or revenue is entire and undivided, if one of the co-sharers discharges the entire liability he would have an equitable claim to contribution as against the other sharers. The principle underlying this rule of law must commend itself to you as sound and good equity. In the Indian

Contribution among co sharers.

Contract Act.

Contract Act IX of 1872, there is a chapter which treats of certain relations resembling those created by contract, and in that chapter Sec. 69 provides—“A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be re-imbursed by the other.” In the case under our consideration, it is true, that the “another” was not bound to pay the entire rent or revenue, but only a fraction of it as between himself and his co-sharers, and that the person who discharged the entire liability was bound to discharge a portion of it. But as the “another” was benefited by what may be called the excess payment, he would be justly liable to contribute his share of the excess in an action by the person who paid the entire amount. You should notice that the law contemplates that the person who discharges the liability must be one interested in the payment of the money. One who, therefore, makes a voluntary payment cannot come under this section.

Equitable doctrine.

In *Ram Bux Chittangeo v. Modoo Soodhun Paul Chowdhry* (1867) 7 W. R. 377; B. L. R. sup. vol. 675; 2 Ind. Jur. N. S. 155, it was laid down that in such cases the right to contribution rests upon the equitable doctrine that one shall not bear the whole burthen in case of the rest, and that all the co-sharers shall bear the burthen in proportion to their respective shares. Sir Barnes Peacock, C.J., in delivering the judgment of the Full Court went to the length of saying that the obligation would arise even if the payment were made “contrary to express directions.”

Though it may be desirable to consider here only the substantive law as regards the rights of joint owners, reserving for a subsequent Lecture the adjective law and all questions of procedure, it would certainly be more convenient to find all the

law bearing on such contribution suits in the same place. With the view of securing this convenience, I shall consider here the question of jurisdiction and procedure applicable to these special suits.

Now the decision in Chittangeo's case proceeds mainly on the question of jurisdiction, and was passed at a time when the Contract Act had not been passed. On the question of jurisdiction, it laid down that a Small Cause Court had no jurisdiction to try a suit for contribution. It was followed, though not without considerable hesitation, in *Nobin Krishna Chakravati v. Ram Kumar Chakravati* (1881) I. L. R. 7 Cal. 605; 9 C. L. R. 90, and subsequently again in *Ramjoy Surmah v. Joynath Surmah* (1882) I. L. R. 9 Cal. 395; 12 C. L. R. 314. In *Krishno Kamini Chowdhurani v. Gopi Mohun Ghose Hazra* (1888) I. L. R. 15 Cal. 652 a Full Bench of the Calcutta High Court held that the Contract Act of 1892 had effected a change in the law, and that the Court of Small Causes would have jurisdiction under Act XI of 1865 to entertain such suits for contribution.

Under Act
XI of 1865
after pass-
ing of Con-
tract Act.

To the same effect is the law laid down by a Full Bench of the Allahabad Court in *Nath Prasad v. Baijnath* (1880) I. L. R. 3 All. 66. The Madras Court, even before the passing of the Contract Act, had laid down that such suits for contribution would be cognizable in the ordinary Courts of Small Causes. *Vide* *Govinda Muneya Tiruyan v. Bapu* (1870) 5 Mad. H. C. Reports 200.

The question of jurisdiction, as regards suits in the mofussil, has now been settled by the Provincial Small Cause Court Act IX of 1887. In Schedule II of the Act, Art. (41) suits for contribution are expressly excepted from the jurisdiction of Courts of Small Causes in the mofussil. In the Presidency Small Cause Courts Act XV of

Under
present Act.

Under
Presidency
S. C. Court
Act.

1882 suits for contribution are not excepted from the jurisdiction of Small Cause Courts in the Presidency Towns.

I have here considered only the case of liability for rent or revenue. But a suit for contribution would lie all the same at the instance of any one sharer paying the whole of any other similar demand, *e.g.*, the cesses, &c.

Payment of
revenue
secures no
lien.

The question whether a co-sharer upon paying the revenue due by another undivided co-sharer or upon paying the entire revenue due upon the whole estate acquires a charge over the share of his coparcener may now be taken, as regards Bengal, to have been settled in the negative by the Full Bench decision in *Kinuram Das v. Mozaffer Hosain Shaha* (1887) I. L. R. 14 Cal. 809. The earlier decisions on the point and the *dictum* of the Privy Council in *Nugender Chunder Ghose v. Kaminee Dassee* 11 M. I. A. 241 were considered at length by the Full Court. The judges came to the conclusion that by such payment of revenue the co-sharer did not obtain a charge, because there was nothing in Act XI of 1859 to give rise to such a charge. As regards the N.-W. Provinces the law has been settled to the same effect by the Full Bench decisions in *Seth Chitor Mal v. Shib Lal* (1892) I. L. R. 14 All. 273.

When pay-
ment of
rent secures
lien.

In Bengal, if a tenure or a holding is owned jointly by a number of persons, and if one of them should pay into Court the whole rent, *when the tenure or the holding has been advertised for sale*, he would acquire a lien on the tenure or holding under the provisions of Sec. 171 of the Bengal Tenancy Act. The words of the section are very wide and would admit of under-tenants as well as co-sharers paying up the decree and acquiring a lien. You should note that under the strict letter of the law no such lien would be acquired if the pay-

ment be made before the tenure or the holding is advertised for sale. You should also note that as sales under the Patni Regulation VIII of 1819 are made by the Collector, no payment can be made into "Court." (see *Tariny Debi v. Shama Churn Mitter* (1882) I. L. R. 8 Cal. 954).

In a suit for contribution, all the parties interested—all the shareholders—should be made parties; *vide* the case of *Khema Deba v. Kamola Kant Bukshi* (1868) 10 W. R. 10, 10 B. L. R. 259 note.

Parties to contribution suits.

In the same case, Justice Markby ruled that in such a suit, though all the co-sharers may be sued together, yet it is the business of the Court by its decree to apportion the liability among the shareholders according to their respective shares, and not to give a joint decree against all. In *Bholanath Chatterjee v. Inder Chand Doogur* (1870) 14 W. R. 373 it was ruled that in order to prevent a multiplicity of suits, the plaint in such a case should specify the amount due by each of the co-defendants. The decision in *Pitambur Chuckerbutty v. Bhyrubnath Paleet* 1871 15 W. R. 25 is to the same effect. The principle of the above decision was adopted by the Allahabad Court in *Ibn Husain v. Ramdai* (1889) I. L. R. 12 All. 110.

Decree in such suit.

Plaint to specify shares.

But there is no right of contribution among wrong-doers in respect of their joint liability for a wrongful act which was done by them with the knowledge that the act was wrongful. Thus if two persons, after forcibly and wrongfully dispossessing a rightful owner of some land, continue in joint possession of the same until they are ousted by a decree of Court making them jointly liable for mesne profits, and, if in execution of decree, the entire mesne profits be recovered by the rightful owner from one of the two wrong-doers, such

Contribution among wrong-doers.

Among
persons
jointly,
liable for
breach of
contract.

wrong-doer would not have a right to claim contribution from his companion. You should note that the law requires that the wrongful act should be known as such to the parties. See *Suput Singh v. Imrit Tewari* (1880) I. L. R. 5 Cal. 720; 6 C. L. R. 62. The principle of this decision was adopted by the Allahabad Court in *Kishna Ram v. Rakmini Sewak Singh* (1887) I. L. R. 9 All. 221 and assumed as correct by the Madras Court in *Thangammal v. Thyyamuthu* (1887) I. L. R. 10 Mad. 518. But though there is no right of contribution among joint wrong-doers or tort-feasors such a right exists among persons who have been jointly made liable for damages on account of a breach of contract. The leading case of *Merry Weather v. Nixon* 2 Smith's Leading Cases p. 546, points out the distinction between the two classes of cases. See *Brojendro Kumar Roy Chowdhry v. Rash Behari Roy Chowdhry* (1886) I. L. R. 13 Cal. 300.

One of the questions that frequently arise in connection with joint property is whether a co-sharer who spends money over any improvement of joint property is entitled to be reimbursed by the other co-sharers in proportion to the shares of these latter. If the other co-sharers enjoy the benefit of the improvement there is no reason why they should not pay for the same in proportion to their share in the property. The case would be more difficult if the co-sharer bent on making the improvement, makes it notwithstanding the express wishes of his co-sharers to the contrary.

But even in such a case if the improvement is attended with an additional advantage and the other co-sharers enjoy this additional advantage, the law would compel them to pay for the improvement. See *Muttasvami Gaudan v. Subbira Maniya*

Gaundan (1863) 1 Mad. H. C. Rep. p. 309; also Buzloul Hossein v. Gunput Chowdhry (1876) 25 W. R. 170; also Mahomed Khan v. Shaista Khan 2 N.-W. P. Rep. p. 248.

A distinction may be, and is generally, made between repairs and improvements. As to repairs made to the subject matter of a co-tenancy, Mr. Freeman, in his work on "Co-tenancy and Partition" 2nd edition, Section 261, says "compensation may be claimed; 1st, as forming a sufficient affirmative cause of action against one of the co-owners not contributing his proportion of the expenses thereof; 2nd as forming a matter of set off, to be deducted from an amount which one making the repairs is under obligation to pay to another of the co-tenants for mesne profits, or profits made or received from the thing owned in common..... All the cases agree that a notice of the repairs needed, and a demand that he participate in making them, is a pre-requisite to a recovery in such action against a part owner." But as to improvements, that author says (Sec. 262)—"Neither co-tenant has any power to compel the others to unite with him in erecting buildings or in making any other improvements upon the common property. If either chooses to make such improvements, he cannot recover from the others for their share of the expenses incurred thereby, in the absence of an express agreement on their part, or of such circumstances, or such a course of dealing between the parties, as convinces the Court that a mutual understanding existed between them to the effect that these expenses were to be repaid. It naturally follows, from the rule that one co-tenant is not entitled to charge the others for improvements made without their authority, that the latter have no such interest in such improvements as to make them the basis of any part of a claim

Repairs

Improvements.

against the co-tenant erecting them. Hence, when called upon to account, he cannot be charged with the increase in the productive value of the property resulting from his improvements; nor, on the other hand, can he insist upon holding the entire property until reimbursed for money expended in improvements made without the consent of his co-tenants. If a co-tenant has assented to or authorized improvements to be made, he is answerable therefor."

Injunction
against a
shareholder's use.

At one time it was thought that each of joint proprietors had a right to enjoy the whole land, and therefore if any of them took up exclusive possession of the whole or a portion, the others of them even without proving any damage could obtain an injunction to restrain the one from exclusive possession. On this point see *Stalkartt v. Gopal Panday* (1873) 20 W. R. 168; 12 B. L. R. 197 in which Justice Phear observed—"The lands have not been partitioned, and as holders of an undivided 4 anna share they are part-owners of every beegah of the whole mouza, and by virtue of that right of ownership, I apprehend that they can claim either to occupy the land themselves jointly with the defendant or defendant's assignees, or to insist that the land shall not be occupied and used by any person (excepting always persons having a right of occupancy) otherwise than with their assent." In the case of *Nundun Lall v. Lloyd* (1874) 22 W. R. 74 the same learned judge observes "one shareholder alone in a joint-estate, or his assignee, cannot claim to cultivate any portion of the joint property, which is not his zeraif land, exclusively without the consent of the other shareholders, merely on the ground that he is willing to pay a reasonable rent for it." In *Lloyd v. Sogra* (1876) 25 W. R. 313, Sir Richard Garth in concurrence with Justice Ainslie

held that where a suit was brought to recover possession of certain lands in which plaintiff and defendant were co-sharers, and to secure damages for the exclusive possession which defendant had enjoyed for some years, and to obtain an injunction against defendant to prevent him from cultivating indigo on the land in suit without the consent of the plaintiff, it would be an ineffectual way of enforcing plaintiff's right to allow the adverse possession of the defendant to continue and to let the plaintiff recover damages from time to time.

In all the above cases, the Court granted plaintiff the injunction prayed for. But in the *Shamnugger Jute Factory Co., Limited v. Ram Narain Chatterjee* (1886) I. L. R. 14 Cal. 189 Justice Wilson in concurrence with Justice Porter held in 1886 that in granting or withholding an injunction, a Court should exercise a judicial discretion, and should weigh the amount of substantial mischief done or threatened to the plaintiff against that which the injunction, if granted, would cause to the defendant. The judgment further laid down that there was no such broad proposition as that one co-owner was entitled to an injunction restraining another co-owner from exceeding his rights, absolutely and without reference to the amount of damage to be sustained by the one side or the other from the granting or the withholding of the injunction. In deciding this case the judges followed the principle laid down in 1869 by Sir Barnes Peacock, C. J., in *Biswambhar Lal v. Rajaram* 3 B. L. R., Ap. 67. The learned Chief Justice is reported to have said in delivering the judgment of the Court : " It appears to me that even if the defendant had not a strict legal right to build the wall upon the joint land, that this is not a case in

No injunction except on proof of waste.

which a Court of Equity ought to give its assistance for the purpose of having the wall pulled down. A man may insist upon his strict rights but a Court of Equity is not bound to give its assistance for the enforcement of such strict rights. It appears to me that this is a case in which apparently no injury to the plaintiff has been caused by the erection of the wall, and that, therefore, the plaintiff ought to be left to such remedy as he may have, without applying to a Court of Equity for assistance, in having the wall demolished." To the same effect are the decisions in *Nocury Lal Chuckerbutty v. Brindabun Chunder Chuckerbutty* (1882) I. L. R. 8 Cal. 708; and *Joy Chunder Rukhit v. Bippro Churn Rukhit* (1886) I. L. R. 14 Cal. 236.

The above cases were followed by Justice Mahmud in *Parasram v. Sherjit* (1887) I. L. R. 9 All. 661 and the principle underlying these decisions was affirmed by the Full Bench in *Shadi v. Anup Singh* (1889) I. L. R. 12 All. 436.

The result of the above decisions is that if a co-sharer attempts to take up exclusive possession of any lands in excess of his legitimate share, and his co-sharers in consequence apprehend loss, a Court would be justified in granting an injunction to prevent such prospective loss to the co-sharers. But when a co-sharer has already taken exclusive possession, a Court should not deprive him of such possession except on very strong grounds. Thus, the Privy Council in the case of *Watson & Co. v. Ram Chund Dutt* (1890) I. L. R. 18 Cal. 10; L. R. 17 I. A. 110 held that if in any case the dispossessing co-sharer does not dispute the title of the other co-sharers but simply tries to defend his own possession, and if it should appear to the Court that the granting of an injunction may have the effect of deteriorating the pro-

**Watson v.
Ram Chund
Dutt.**

perty in value, while the loss of the co-sharers may be re-imbursed by money-payment, an injunction should not be granted to put the plaintiff in joint possession with the defendants. Sir Barnes Peacock, in delivering the judgment of the Judicial Committee, observed :—" It seems to their Lordships that if there be two or more tenants in common, and one (A) be in actual occupation of part of the estate, and is engaged in cultivating that part in a proper course of cultivation as if it were his separate property, and another tenant in common (B) attempts to come upon the said part for the purpose of carrying on operations there inconsistent with the course of cultivation in which A is engaged and the profitable use by him of the said part, and A resists and prevents such entry, not in denial of B's title, but simply with the object of protecting himself in the profitable enjoyment of the land, such conduct on the part of A would not entitle B to a decree for joint possession - - - In India a large proportion of the lands, including many very large estates, is held in undivided shares, and if one shareholder can restrain another from cultivating a portion of the estate in a proper and husbandman like manner, the whole estate may, by means of cross injunctions, have to remain altogether without cultivation until all the shareholders can agree upon a mode of cultivation to be adopted, or until a partition by metes and bounds can be effected, a work which, in ordinary course in large estates, would probably occupy a period including many seasons. In such a case, in a climate like that of India, land which had been brought into cultivation would probably become waste or jungle, and greatly deteriorated in value. In Bengal the Courts of Justice, in cases where no specific rule exists, are to act according to justice, equity, and good conscience, and if in

a case of shareholders holding lands in common, it should be found that one shareholder is in the act of cultivating a portion of the lands which is not being actually used by another, it would scarcely be consistent with the rule above indicated to restrain him from proceeding with his work, or to allow any other shareholder to appropriate to himself the fruits of the other's labour or capital."

**Lachmeswar Singh
v. Manowar
Hossein,**

**One joint
proprietor
without in-
juring his
co-proprie-
tors may use
joint pro-
perty so as
to be en-
titled to
exclusive
profits.**

The above observations were quoted with approbation by Lord Hobhouse in *Lachmeswar Sing v. Manowar Hossein* (1891) I. L. R. 19 Cal. p. 253 ; L. R. 19 I. A. 48. This last is a very important case on the question of joint ownership. Here a river bed with the banks, was the joint property of the plaintiff and the defendant. The defendant at his own expense had plied a ferry for some years across the river, and used the banks for landing passengers. By reason of the river and the landing ghats on both sides being the joint property of the plaintiff and the defendant, plaintiff claimed a share of the profits of the ferry in proportion to his share in the lands. Their Lordships observed "The parties are co-owners, and the defendant has made use of the joint property in a way quite consistent with the continuance of the joint ownership and possession. He has not excluded any co-sharer. It is not alleged that he has used the river for passage in any such way as to interfere with the passage of other people. It is not alleged that the defendant's proceedings have prevented any one else from setting up a boat for himself or his men, or even from carrying strangers for payment....All that is complained of is that he has expended money in a certain use of the joint property, and has thereby reaped a profit for himself. But property does not cease to be joint merely because it is used so as to produce more to one of the owners who has incurred expenditure or

risk for that purpose." And again "If the defendant's use of the landing places and the river is consistent with joint possession, why should the plaintiffs have any of the profits? They have not earned any, and none have been earned by the exclusion of them from possession." The plaintiff's suit was dismissed with these and similar observations. See also *Gopee Kishen Gossain v. Hem Chunder Gossain* (1870) 13 W. R. 322; and *Anantram Rav v. Gopal Balvant* (1894) I. L. R. 19 Bom. 269.

The Reports teem with cases of individual co-sharers erecting for their exclusive use *pucca* houses on portions of joint land, and the question oftentimes raised is whether such buildings ought not to be demolished. Now, if one of a number of co-sharers intending to appropriate to his own use his share of the joint land should, without partition, take up a portion of such land and build a *pucca* house for his own habitation, he should not be treated as a trespasser. So also if a sharer seeing one of his co-sharers erect a house on a piece of joint land stand by and make no objection, a Court of Equity will presume his acquiescence to the erection of the building. From these two fundamental principles it follows that if the land covered by the building does not exceed appreciably the area that would represent such co-sharer's portion, and further if the objecting co-sharers do not object to the erection of the buildings in proper time, a Court of Equity will not favour the claim. But if in the case where a sharer makes his own selection, the objection of the other co-sharers is made at or before the commencement of the building operations, a Court of Equity will favour the objectors, unless the portion taken up approximately represents the proper share of such co-sharer. See the Full Bench

**Buildings
on joint
lands.**

**Acquies-
cence.**

decision in *Shadi v. Anup Sing* (1889) I. L. R. 12 All. 436 already referred to.

Reasonable rent where demolition would be a hardship

In cases where the demolition of building would entail hardship—*e. g.*, where a co-sharer admitting the rights of his co-sharers took up a little more land than his proper share owing to a *bona fide* mistake—a Court of Equity should make up the loss of the co-sharers by decreeing them reasonable rent or other compensation. In *Pran Kishore Gossain v. Dinnobundhoo Chatterjee* (1868) 9 W. R. 291 the Court thought that as the lands in suit had been in the possession of the co-sharer-defendants as tenants, they could not be ousted therefrom by the co-sharer-plaintiff though they might be liable for rent.

No demolition if practicable.

The result of the above discussion is, that in no case should the Courts, at the instance of a co-sharer, order demolition of *pucca* buildings on joint land, after the same have been erected by another co-sharer, unless it be shown (1) that injury would otherwise accrue to the co-sharer-plaintiff and (2) that before the buildings were started objection was taken to their erection. *Nocurry Lall Chuckerbutty v. Brindabun Chunder Chuckerbutty* (1886) I. L. R. 8 Cal. 708. In short, it is only where a co-sharer cannot be adequately compensated otherwise than by the demolition of a building that a Court of Equity should order such demolition.

An ordinary case of a dwelling house in Bengal.

It not unfrequently happens that as regards the ancestral dwelling house of a number of shareholders, there is a mutual understanding among the co-sharers whereby the parties appropriate to their several use specific portions of such house, and make additions to, and alterations in, these portions at their own expense to suit their convenience. In such cases, at a general partition, the parties ought to get credit for the

the ceremony of *tulub-moowathubut*" or words to that effect.

If the pre-emptor should make any delay in declaring his intention, he loses his right. See *Ali Muhammad v. Taj Muhammad* (1876) 1 L. R. 1 All. 263; *Bhairon Sing v. Lalman* (1884) 1 L. R. 7 All. 23; *Surdharce Lall v. Laboo Moodee* (1876) 25 W. R. 499. In *Koromali v. Amir Ali* 3 C. L. R. 166 where the first demand was made in the presence of the purchaser, the seller and the purchased premises, and with invocation of witnesses, the Court held that the second demand was not necessary. See also *Jadunundun Sing v. Dulput Sing* (1884) 1 L. R. 10 Cal. 581.

Should the seller or the purchaser object to the pre-emptor's right, the pre-emptor must enforce his claim by an action, and under the Mahomedan law the action must be instituted within a month of the time when the pre-emptor first became aware of the sale. But under the Limitation Act, (and in this respect the provisions of the Limitation Act and not the Mahomedan law will determine the period), the pre-emptor has a year* from the registration of the conveyance, or, the taking of possession by the purchaser, within which to prefer his claim in a court of justice.

Suit for pre-emption.

Limitation.

A suit for pre-emption ought to be valued for purposes of jurisdiction at the value at which the property has been sold. *Naun Singh v. Rash Behari Singh* (1886) 1 L. R., 13 Cal. 255. To such a suit the defendants should be the seller and the purchaser, and the plaintiff should prove his right as co-sharer in the substance or in the appurtenances, as the case may be. He should also prove that the purchaser purchased the property for the price ascertained by him

Valuation.

Parties to suit.

* Act XV of 1877 Sch. II, Art. 10.

Not necessary to deposit price.

and express his willingness to take the property upon the same terms as the purchaser-defendant. It would not be necessary* for the pre-emptor to deposit the price into court on preferring his claim. It would be sufficient if he would pay it when his right has been declared by Court, or when the Court would require him to pay it. But if he fails to pay the price in strict compliance with the Court's order, he loses his rights under the decree. *Jai Kishn v. Bholanath* (1892) I. L. R. 14 All. 529.

Court to determine the price bargained for and not market price.

Onus of proof.

In several of these suits for pre-emption, a question arises as to whether in order to defeat the right of pre-emption a considerably higher price was not entered in the conveyance than what was actually paid or stipulated for. In such cases the Court is called upon to determine not what the market price of the premises in question should be, but what was the real price, for which the premises were contracted to be sold, or which was paid by the purchaser. Very slight proof need be given by the pre-emptor on this point. He is not expected to know what price was fixed upon between the buyer and the seller. If he gives evidence to show that the market price of the premises was considerably below the sum mentioned in the conveyance, the purchaser should be called upon to prove by strong evidence what price he actually paid or agreed to pay. On this point see *Bhagwan Singh v. Mahabir Singh* (1882) I. L. R. 5 All. 184; *Tawakkul Rai v. Lachman Rai* (1884) I. L. R., 6 All. 344; *Sheopargash Dube v. Dhanraj Dube* (1887) I. L. R. 9 All. 225; *Agar Singh v. Raghuraj Singh* (1887) I. L. R., 9 All. 471. In *Ajaib Nath v. Muthura*

* *Khoffeh Jan Bebee v. Mahomed Mehdee* (1868) 10 W. R. 211; *Heera Lall v. Moorut Lall* (1869) 11 W. R. 275; *Nundo Pershad Thakur v. Gopal Thakur* (1884) I. L. R. 10 Cal. 1008.

Prasad (1888) I. L. R., 11 All. 164 where the price was settled by compromise, it was held that the consideration payable by the pre-emptor was the amount specified in the compromise. In *Ashik Ali v. Mathura Kandu* (1882) I. L. R., 5 All. 187, where there was originally a mortgage by conditional sale, the court held that the entire amount due on the mortgage was the consideration payable by the pre-emptor.

We have seen that the rights of pre-emptors of the same class are equal and that if one of the pre-emptors resigns his right, such resignation enures to the benefit of the rest. All this can be done before decree. If the resignation by one co-sharer be made after decree, the entire share sold cannot be taken up by the other co-sharer but each of these latter must take according to the decree.

Resignation must be before decree in order that a co-sharer may benefit.

The same rule holds in the case of pre-emptors of different classes. Thus, we have seen that the right of a partner in substance is superior to that of a partner in the appurtenances, and that if a partner in substance should resign, the right of the partner in the appurtenances would arise. But no such benefit can accrue to the pre-emptors of the lower class, if the resignation be made after decree. So also a pre-emptor claiming in one right cannot get a decree in a different right. *Sheojuttun Roy v. Anwar Ali* (1870) 13 W. R. 189.

A pre-emptor may lose his right by laches* or by voluntary act. If he fails to comply with the preliminaries in due time he loses his right by laches. Sometimes also a pre-emptor is seen to give up his right of his own accord. He may do so by acquiescing in the sale, or by taking an agreement from the purchaser. *Habibunnissa v. Barkat Ali* (1886) I. L. R., 8 All. 275.

Loss of right by laches.

* *Bhairon v. Lalman* (1884) I. L. R. 7 All. 23; *Habib-un-Nissa v. Barkat Ali* (1886) I. L. R., 8 All. 275.

Ceremonies may be performed by agent The ceremonies which have to be performed by a pre-emptor may be performed by an agent. *Wajid Ali Khan v. Hanuman Prasad* (1869) 4 B. L. R., A. C., 139; 12 W. R. 484; *Abadi Begam v. Inam Begam* (1877) I. L. R. 1 All. 521. In such cases the same effect should be given to the manager's acts and omissions as to the acts and omissions of the principal. *Harihar Dut v. Sheo Prasad* (1884) I. L. R. 7 All. 41.

When right which had accrued ceases. The right according to the Mahomedan law ceases upon the death of the pre-emptor after the making of the two demands and before taking the premises under the pre-emption. For the same reason, the right ceases when the pre-emptor dies before decree; but if he dies after obtaining a decree and before paying the price or obtaining possession of the property, his heirs get the benefit of the decree and become responsible for the price (*Baillie's Digest* Vol. I p. 499).

Right revives upon information as to price, or thing sold. In some cases the pre-emptor relinquishes his right upon misinformation of the price, the purchaser, or, the thing sold. If in such cases upon receipt of correct information, the pre-emptor should wish to enforce his right he would be at liberty to do so. But the onus would lie very heavily on him to prove his case of misinformation and *bona fides*. *Lajja Prasad v. Debi Prasad* (1880) I. L. R. 3 All. 236.

Surrender must be after accrual of right. In order that a purchaser may reap the benefit of a surrender by the pre-emptor, such surrender must be shown to have been made after the accrual of the right of pre-emption. A surrender before a sale is not effective. But in *Braja Kishor Surma v. Kirti Chandra Surma* (1872) 7 B. L. R. 19; 15 W. R. 247, the correctness of the law was questioned by Justice Onoocool Chandra Mookerjee. On this point see *Toral Komhar v. Auchhi* (1873) 9 B. L. R. 253; 18 W. R. 401;

Kooldeep Singh *v.* Ram Deen Singh (1875) 24 W. R. 198; Abadi Begam *v.* Inam Begam (1877) I. L. R. 1 All. 521.

When the purchaser before the passing of the decree has made improvements on the property, the pre-emptor may either take them for their value, or allow the purchaser to remove them. In such cases if the improvements were made after the pre-emptor's demand was known to the purchaser, and if the removal of the improvements would deteriorate the land in value, it would be competent to the Court to order possession to be given to the pre-emptor with the improvements without his having to pay for them. A purchaser knowing of the demand should therefore abstain from incurring any expenditure on improvements. But if the property has been deteriorated in value by the purchaser, the pre-emptor would be entitled to a proportionate deduction in the value. (Baillie's Digest on Mahomedan Law p. 498.)

Pre-emptor entitled to deduction of price if property be deteriorated by purchaser.

The pre-emptor in ordinary cases in getting possession of the property would get it void of all encumbrances that may have been created on it by the purchaser. Were it otherwise, the purchaser might in several cases defeat the pre-emption. Nor is this principle likely to injure any party if the equities are properly worked out. The price paid for the property by the pre-emptor would represent the property and be a substitute for it, and if a *bona fide* mortgage had been created by the purchaser, such mortgage should be satisfied out of the price.

Pre-emptor acquires free of encumbrances created by purchaser.

When property is sold at a public auction, the pre-emptor, in order that he may have a valid right of pre-emption, must bid for the property at auction up to the highest amount for which it may be knocked down. See Tej Singh *v.* Gobind Singh (1880) I. L. R. 2 All. 850; and Hira *v.* Unas Ali

Pre-emption in auction sale.

Khan (1881) I. L. R. 3 All. 827. Section 310 of the Civil Procedure Code (Act XIV of 1882), which the Court had to consider in coming to the above conclusion runs in these words:—"When the property sold in execution of a decree is a share of undivided immovable property, and two or more persons of whom one is a co-sharer, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the co-sharer." But previous to the passing of the present Code, the law was otherwise. Thus, in *Abdul Jabel v. Khelat Chandra Ghose* (1868) 1 B. L. R., A. C. 105; 10 W. R. 165, the High Court of Calcutta had held that under Sec. 14, Act XXIII of 1861 a co-sharer had no right of pre-emption in case of public sale.

The right of pre-emption has been secured in several instances by statutes. Thus in the case of sales for arrears of revenue under the Land Revenue Act of N.-W. P. (Act XIX of 1873) a co-sharer may acquire the right of pre-emption under the provisions of Sec. 188 of the Act. *Baij Nath v. Sital Sing* (1890) I. L. R. 13 All. 224 also recognizes the right of pre-emption in sales for arrears of rent. You will find similar provisions in the Punjab Revenue Act XVII of 1887 Sec. 87.

Devices to
defeat pre-emption.

It is amusing to note the devices generally resorted to by sellers and purchasers to evade the right of pre-emption. Some of these have reference only to the rights of a neighbour. We have no concern with them. The devices frequently used to deprive co-sharers of their just rights are (1) to transfer properties under ostensible deeds of gift; (2) to overstate the price in the conveyance with a view to scare away the co-sharers; and (3) to sell under the same document other property with which the pre-emptor has no concern.

As to this last device, see *Rowshun Koer v. Ram Dihal Roy* (1883) 13 C. L. R. 45.

As to the form of decree in a suit for pre-emption, see the provisions of Sec. 214 of the Civil Procedure Code which runs as follows:—

Form of
decree for
pre-emption.

“When the suit is to enforce a right of pre-emption in respect of a particular sale of property, and the Court finds for the plaintiff, if the amount of purchase-money has not been paid into Court, the decree shall specify a day on or before which it shall be so paid, and shall declare that on payment of such purchase-money, together with the costs (if any) decreed against him, the plaintiff shall obtain possession of the property, but that if such money and costs are not so paid, the suit shall stand dismissed with costs.” See also

Kashinath v. Mukhta Prasad (1884) I. L. R. 6 All. 370 and *Parshadi Lal v. Ram Dial* (1880) I. L. R. 2 All. 744.

Time for
payment of
price to be
fixed in
decree.

It is incumbent that a time should be fixed in the decree for payment of the price. The Appellate Court may extend such time *Parshadi Lal v. Ram Dial* (1880) I. L. R. 2 All. 744. See also *Rup Chand v. Shamsul Jehan* (1889) I. L. R. 11 All. 346; and *Balmukand v. Pancham* (1888) I. L. R. 10 All. 400. In *Naubat Singh v. Kishan Singh* (1881) I. L. R. 3 All. 753 it was held that a decree for possession in favour of a pre-emptor might be made conditional upon his paying a higher sum on account of the price than what was first offered by him. In *Jai Kishen v. Bholanath* (1892) I. L. R. 14 All. 529 it was held that if the pre-emptor failed to pay the price within the time mentioned in the decree he lost his right. It should be noted that a pre-emptor would not be able to claim the benefit of any arrangement as to the payment of price by instalments made between the vendor and the vendee. *Nihal Singh v. Kokale Singh* (1885) I. L. R. 8 All. 29.

**Pre-emptor
not entitled
to mesne
profits.**

In *Deodat v. Ram Autar* (1886) I. L. R. 8 All. 502, it was held that the vendee in possession could not be deemed a trespasser and that the pre-emptor would not be entitled to mesne profits from him. This principle was approved by the Full Bench in *Deokinandan v. Sri Ram* (1889) I. L. R. 12 All. 234. These cases laid down that the right of the pre-emptor to possession accrued from when he completed his purchase by payment of the price.

**Pre-emption
among the
Shiah sect
exists only
between
two co-
sharers.**

The prevalent doctrine of the Shiah sect is that no right of pre-emption exists in the case of property owned by more than two co-sharers. *Abbas Ali v. Mayaram* (1888) I. L. R. 12 All. 229.

estates, with separate revenue-liabilities, if default is made in the payment of revenue, only the small estate on account of which the revenue is due is liable to be sold for the realization of the Government demand. If, therefore, the proprietors of estates had the power of making partition privately, they might create false shares of small areas with big revenue-liabilities and appropriate the rest on nominal revenues. Such a course might make the Government revenues insecure; and accordingly we find in Secs. 12 and 101-107 of the Partition Act for Bengal (VIII of 1876 B. C.) provision made, for the revenue authorities to test the correctness of private partitions before giving effect to them. Similar provisions, as we shall see in a subsequent Lecture, have been made for the other provinces.

For the same reasons the Bengal Tenancy Act Sec. 88 provides:—"A division of a tenure or holding, or distribution of the rent payable in respect thereof, shall not be binding on the landlord unless it is made with his consent in writing."

Partition of tenancies under B. T. Act.

Let us next consider the effects of a surrender by one of several tenants. Where a joint lease was given to many persons with an entirety and equality of interest among the tenants, the resignation of some of the joint lessees was held not necessarily to void the lease, *Mohima Chunder Sein v. Pitambur Shaha* (1868) 9 W. R. 147. In such a case the landlord would not be *bound* to accept any partial surrender. If the lease had been originally granted to one person and by inheritance came to be enjoyed by several shareholders, the surrender, in order to be effective and binding on the landlord, must be a surrender of the whole lease by all the co-sharers. It is, of course, optional with the landlord either to accept the partial surrender or not.

Surrender by one of several tenants.

Opening of
separate
accounts
under Act
XI of 1859.

Estates paying revenue to Government are frequently held jointly by several owners. In some cases, the owners hold the entire lands comprised in the estate in common tenancy in defined shares for each proprietor. In other cases, specific portions of the lands comprised in the estate are held by the proprietors respectively who have to pay definite sums for Government revenue. In either case whenever there is a default in the payment of the Government revenue, the entire estate may be sold for the realization of the demand. But the sharers have, under the law, certain powers, to prevent their shares from being sold for default made by their co-sharers.* I refer

* "X. When a recorded sharer of joint estate, held in common tenancy, desires to pay his share of the Government Revenue separately, he may submit to the Collector a written application to that effect. The application must contain a specification of the share held in the estate by the applicant. The Collector shall then cause to be published in his own office, in the Court of the Judge, Magistrate (or Joint Magistrate as the case may be,) and Moonsiffs and in the Police Thannahs in whose jurisdiction the estate or any part thereof is situated, as well as on some conspicuous part of the estate itself, a copy of the application made to him. If within six weeks from the date of the publication of these notices, no objection is made by any other recorded sharer, the Collector shall open a separate account with the applicant, and shall credit separately to his share all payments made by him on account of it. The date on which the Collector records his sanction to the opening of a separate account shall be held to be that from which the separate liabilities of the share of the applicant commence."

XI. When a recorded sharer of joint estate, whose share consists of a specific portion of the land of the estate, desires to pay his share of the Government revenue separately, he may submit to the Collector a written application to that effect. The application must contain a specification of the land comprised in his share, and of the boundaries and extent thereof, together with a statement of the amount of Sudder Jumma heretofore paid on account of it. On the receipt of this application, the Collector shall cause it to be published in the manner prescribed for publication of notice in the last preceding section. In the event of no objection being urged by any recorded co-sharer within six weeks from the time of publication, the Collector shall open a separate account with the applicant, and shall credit separately to his share all payments made by him on account of it. The date on which the Collector records his sanction to the opening of a separate account, shall be held to be that from which the separate liabilities of the share of the applicant commence.

XII. If any recorded proprietor of the estate, whether the same be held in common tenancy or otherwise, object that the applicant has no right to the share claimed by him, or that his interest in the

to the provisions of Secs. 10-15 of Act XI of 1859.

If in a *pattidari* or imperfect *pattidari* mahal some of the co-sharers refuse, or fail within 30 days from the date of the declaration by the Settlement Officer, to accept the proposed assessment, the shares of the persons so refusing or failing are either farmed out by the settlement officer or the Collector of the District with the previous sanction of the Board of Revenue or held under direct management,—the persons excluded being granted an allowance of 5 to 15 per cent. on the proposed assessment: *vide* Secs. 45-49 Act XIX of 1873.

In N.-W. P. When co-sharers refuse settlement of Pattidari mahal.

estate is less or other than that claimed by him, or if the application be in respect of a specific portion of the land of an estate, that the amount of Sudder Jumma stated by the applicant to have been heretofore paid on account of such portion of land, is not the amount which has been recognized by the other sharers as the Jumma thereof, the Collector shall refer the parties to the Civil Court, and shall suspend proceedings until the question at issue is judicially determined."

XIII Whenever the Collector shall have ordered a separate account or accounts to be kept for one or more shares, if the estate shall become liable to sale for arrears of revenue, the Collector or other officer as aforesaid, in the first place shall put up to sale only that share or those shares of the estate from which, according to the separate accounts an arrear of revenue may be due. In all such cases notice of the intention of excluding the share or shares from which no arrear is due, shall be given in the advertisement of sale prescribed in Section VI of this Act. The share or shares sold, together with the share or shares excluded from the sale, shall continue to constitute one integral estate, the share or shares sold being charged with the separate portion or the aggregate of the several separate portions of Jumma assigned thereto.

XIV. If in any case of a sale held according to the provisions of the last preceding Section, the highest offer for the share exposed to sale shall not equal the amount of arrear due thereupon to the date of sale, the Collector or other officer as aforesaid shall stop the sale, and shall declare that the entire estate will be put up to sale for arrears of Revenue at a future date, unless the other recorded sharer or sharers or one or more of them, shall within ten days purchase the share in arrear by paying to Government the whole arrear due from such share. If such purchase be completed, the Collector or other officers as aforesaid shall give such certificate and delivery of possession as are provided for in Sections XXVIII and XXIX of this Act, to the purchaser or purchasers, who shall have the same rights as if the share had been purchased by him or them at the sale. If no such purchase be made within ten days as aforesaid, the entire estate shall be sold, after notification for such period and publication in such manner as is prescribed in Section VI of this Act."

Record of rights to determine the proportions in which revenue should be paid by sharers and the mode in which rent is to be collected.

In preparing a record of rights under the Land Revenue Act, N.-W. P., the Settlement Officer is enjoined to prepare for each mahal, a list of co-sharers, and to record the arrangement made by himself or agreed to by the co-sharers (*a*) for the distribution of the profits derived from sources common to the proprietary body, (*b*) for fixing the share which each co-sharer is to contribute of the Government revenue and of the cesses levied under any law for the time being in force and of the village expenses, and (*c*) as to the manner in which the co-sharers are to collect from the cultivators (see Secs. 64 and 65 *Ibid*).

Right of pre-emption possessed by co-sharer at sales for arrears of revenue

When for the recovery of land revenue due upon it, any patti of a mahal is sold under the provisions of the Land Revenue Act, N.-W. P., any recorded co-sharer not being himself in arrear with regard to such land, may, if the lot has been knocked down to a stranger, claim to take the said land at the sum last bid: provided that the said demand of pre-emption be made on the day of sale and before the officer conducting the sale has left the office for the day: and provided that the claimant fulfil all the other conditions of the sale (see Secs. 188 and 166 *Ibid*). This is also the law in Oudh: Sec. 155 Act XVII of 1876.

A co-sharer landlord cannot enhance rents.

Enhancement of the rent payable by a tenant has to be made after service of notice on the tenant stating the grounds of the enhancement in the same manner as was provided for Bengal in Act VIII (B.C.) of 1869 and Act X of 1859. The law provides that one of several joint landlords cannot enhance the rents payable by a tenant. See Secs. 13 and 106 Act XII of 1881.

One of several tenants cannot surrender.

When a number of persons hold jointly as tenants under a landlord and, as among themselves they make a private partition, so that each holds a specific portion, none of the tenants with-

out the consent of the landlord can surrender his portion independently of the remainder. See the explanation to Sec. 31 Act XII of 1881.

In order to eject a tenant notice has to be given by the landlord to the tenant specifying the land from which he wishes the tenant to be ejected. See Sec. 37 Act XII of 1881. It follows therefore that where a lease is for an entire land, though the tenants may be several persons jointly holding such land, the landlord cannot sue to eject any undivided tenant from the tenure or holding.

One of joint tenants cannot be ejected

As to whether one of several joint landlords can sue for his share of the rent, the law in the N.-W. Provinces is clear. Sec. 106 of the Rent Act XII of 1881 provides: "No co-sharer in an undivided property shall in that character be entitled separately to sue a tenant under this Act, unless he is authorized to receive from such tenant the whole of the rent payable by such tenant, but nothing in this section shall affect any local custom or any special contract." In *Murlidhar v. Ishri Prasad* (1884) I. L. R. 6 All. 576 it was held that one co-sharer could sue for balance of rent due, upon proof that the other co-sharers had been paid their quotas and that Sec. 106 was no bar to such suit.

No co-sharer to sue for portion of rent.

Circumstance in which one co-sharer can sue for share of rent.

When several persons are in possession of a mahal not being a taluqdari mahal, the Settlement Officer may make a joint settlement with all such persons or with their representatives—Act XVII of 1876 Sec. 27.

In Oudh. Joint settlement.

If an arrear of land revenue has become due in respect of the share of any member of a village community, such community or any member thereof may tender payment of such arrears or may offer to pay such arrears by instalments. If such tender be made, or if the Deputy Commissioner considers such offer satisfactory, he may

Member of community or co-sharer can obtain possession of defaulting share by payment of defaulter's revenue.

transfer the share of the defaulting member to the community or member making the tender or offer on such terms as the Deputy Commissioner may think fit, and either for a term of years or until such arrear is paid. In case of conflicting tenders the co-sharer who, in case the share were sold, would have a right of pre-emption under the Oudh Laws is preferred. Sec. 121 *Ibid.*

Tenant not competent to relinquish portion.

As to surrender by one of several tenants, Act XXII of 1886 sec. 20 para. 3 provides that a tenant cannot without the consent of his landlord relinquish a part only of his holding. From this it follows that if there are several joint tenants under the same lease but each enjoys possession of specific plots, no single co-sharer can surrender his specific plot without the consent of his landlord.

Suits for enhancement of rent, ejectment of tenants &c. to be brought by the common manager.

As to the recovery of arrears of rent, enhancement of rent, ejectment of tenants, or distress, a sharer in a joint estate or under-proprietary or other tenure in which a division of land has not been made among the sharers cannot, barring any local custom or special contract, exercise any of the powers conferred by the Act otherwise than through a manager authorized to collect the rents on behalf of all the sharers. Sec. 126 *Ibid.*

In Bombay. A co-sharer as manager can sue for rent &c.

In Bombay it has been held that one of several tenants in common, joint tenants or coparceners unless he is acting by consent of the others as manager of an estate is not at liberty to enhance rents, or eject tenants under him at his pleasure. *Balaji Baikaji Pinge v. Gopal* (1878) 1. L. R. 3 Bom. 23.

In Punjab. Joint liability of tenants for rent.

In the Punjab, without the express consent of the Financial Commissioner, a partition of land among co-sharers does not affect the joint liability of the land, or of the land-owners thereof, for the revenue payable in respect of the land, nor does it

operate to create any new estate : Sec. 110 cl. (1) Act XVII of 1887.

Similarly a partition of a tenancy does not without the express consent of the landlord, affect the joint liability of the co-sharers therein for the payment of the rent thereof : Sec. 110 cl. (2) *Ibid.*

When a mahal owned by several proprietors is re-settled, if some of the proprietors consent and some refuse to accept the Settlement Officer's assessment, the Settlement Officer may, with the sanction of the Chief Commissioner, if the interest of the recusant proprietors in the lands taken into account in the assessment consists entirely of lands held by them separately from the other proprietors, exclude such recusant proprietors from settlement for a period not exceeding 3 years from the date of such exclusion, and either let their lands in farm or take such lands under direct management. In other cases, *i.e.*, when the lands of the recusant proprietors are not separate from the rest, the assessment of the entire mahal is offered to the proprietors who consented to accept the assessment when originally offered, and on their refusal, the mahal is let in farm or taken under direct management.

In Central Provinces.
Settlement in case of a co-sharer refusing to accept settlement.

When the recusant proprietors are excluded, the land of the proprietors who consented to accept the assessment originally offered is deemed to be separate mahal and is assessed as such, and such assessment is offered to the consenting proprietors ; and if the lands of the recusant proprietors are let in farm, the farm is offered to the proprietors who consented to accept the assessment originally offered.

Any proprietor excluded from settlement is entitled to receive from the Government an annual allowance the amount of which is fixed by the Chief Commissioner at 5 to 10 per cent. on the

Allowance of a sharer excluded from settlement.

amount of the assessment offered to him by the Settlement Officer : Act XVIII of 1881, Secs. 58-61.

When the whole of the land comprised in a mahal is held in severalty, the Settlement Officer can apportion to the several holdings the amount with which such land is assessed under a settlement and when only part of the land comprised in a mahal is held in severalty the Settlement Officer can apportion such amount to the part held in common and the part held in severalty, and can further apportion to the several holdings the amount to which they are liable under the former apportionment : Sec. 66 *Ibid*.

**Statutory
pre-emption
among
sharers.**

If in the course of a sale for realization of the revenue the property (mahal or a share thereof) is knocked down to a stranger, the following persons may claim to take it at the sum last bid in the following order :—

(1) Any malguzar who had paid the revenue which as between him and the other malguzars is payable by him.

(2) If the superior proprietorship is sold the inferior proprietor or (3) if the inferior proprietorship is sold, the superior proprietor.—Sec. 110 *Ibid*.

**Tenant not
ordinarily
bound to
pay rent to
one of
several
landlords.**

When two or more persons are landlords of a tenant in respect of the same holding, the tenant, subject to any rule which the Chief Commissioner may from time to time by Notification in the official gazette make in this behalf, and to any contract between the parties, is not bound to pay part of the rent of his holding to one of those persons and part to another or others; and subject as aforesaid, those persons, if the tenant so desires, have to appoint one of their number or some other person to receive the rent : Act IX of 1883, Sec. 8.

**Common
manager to
collect
rents.**

There is a large class of joint property which we have yet to consider. It is the property belonging to a firm, or a body of persons who have agreed to combine their capital, labour or skill in some business. The law of partnership in general is very extensive and is not comprised in our subject. That portion of the law which relates to the rights and liabilities of partners in connection with the partnership property need only be noticed in these Lectures.

Property
of a firm.

The law of partnership has been codified in Secs. 239 to 265 of the Indian Contract Act IX of 1872. All partners have been declared, in the absence of any contract to the contrary, joint owners of all property originally brought into the partnership stock or bought with money belonging to the partnership, or acquired for purposes of the partnership business. The share of each partner in the partnership property is the value of his original contribution increased or diminished by his share of profit or loss : Sec. 253 cl. (1).

Share of
each part-
ner.

Where there are joint debts due from the partnership and also separate debts due from any partner, the partnership property must be applied in the first instance in payment of the debts of the firm, and if there is any surplus, then the share of each partner must be applied in payment of his separate debts or paid to him. The separate property of any partner must be applied first in the payment of his separate debts and the surplus, if any, in the payment of the debts of the firm : Sec. 262.

Partner-
ship pro-
perty pri-
marily liable
for partner-
ship debts
in prefer-
ence to
personal
debts.

Although a partner cannot introduce a stranger into the partnership by a private sale of his own interest to such new member, yet there is nothing to prevent such sale of interest in execution of decree (*ante*. p. 119).

**Family
idol.**

The family idol is often looked upon as joint property. It is held to be a divinity and a juridical person capable of holding property. Large properties are dedicated to such idols by pious Hindus. When such properties, dedicated by remote ancestors, come down to the family, the descendants, by virtue of their right to worship the idols, become entitled to collect the profits of the endowed properties.

In most cases, the sharers, when there are several, worship the idol by turns—these turns being called *palas*—and enjoy the *dewuttur* properties during these turns. Family idols sometimes attract votaries for various causes, and when they are allowed to be worshipped by the public, they bring their owners large presents.

On this subject you may refer to Professor K. K. Bhattacharyya's Lectures pp. 450-458.

LECTURE VII.

Law of Limitations and Procedure.

Different kinds of suits with respect to joint property—Limitation generally applicable to joint property—Limitation specially applicable to joint property—To suits for pre-emption—Effect of fraudulent concealment of sale—To suits to restrain waste by co-sharers—To suits against managers for accounts—To contribution suits—Previous law—To suits under Mitakshara law to set aside father's alienations—To suits to set aside alienations by any other members—To suits between co-sharers for possession—applied to Mahomedan family—conflicting decisions—Under Act XIV of 1859—Act IX of 1871—Present law—Possession of one is possession of family—Law same for movables and immovables—Rules of Procedure—Parties to suits for joint property under Mitakshara—All coparceners must sue—Exception—No suit for share of joint property under Mitakshara against trespasser before partition—When plaintiff sues as manager—Rule in England in suits for joint interest—Reason of the exception—After decree upon joint liability against some co-sharers, others cannot be sued—Suits by sharers in Dayabhaga or Mahomedan family—Suits by single sharers for enhancement of rent or ejectment—Procedure in suits for contribution—Parties to pre-emption suits and valuation thereof under Court Fees Act—Valuation of suits for shares of family property under Court Fees Act—Of suits for maintenance—Jurisdiction—Valuation of partition suits under Court Fees Act—Valuation of such suits for jurisdiction—Views of Bombay Court—Effect of decree in partition suit—Effect of decree in partition suit when plaintiff's share only is separated—Views of Allahabad Court—Receivers in Partition suits—Costs in such suits.

In this Lecture I intend to consider (1) the various periods of Limitation applicable to suits concerning joint property, and (2) the rules of Procedure prescribed for such suits.

Different kinds of suits with respect to joint property.

Now, suits relating to joint property may be classed under three heads: (1) those in which the joint proprietors or any of them sue, or are sued by, a stranger for recovery of the entire joint property or of some interest therein; (2) those in which one co-sharer sues to recover from a stranger his share of the joint property; and (3) those in which one sharer sues another, or the other co-sharers, for some relief in respect of the joint property.

Limitation generally applicable to joint property.

We have seen that all tangible property and all intangible rights, that may be the subjects of ownership, may as well form the subjects of joint ownership. It follows from this, that in dealing with the first class of suits above mentioned, we have to consider the law of limitations applicable to all kinds of property. Babu Upendra Nath Mitra, in his admirable Lectures on the Law of Limitations, has dwelt on the law generally, and the object of the present Lectures is not to consider all the law that is applicable to joint property in common with every kind of property, but to consider and discuss only such laws as have special application to joint property. The only remark, therefore, that I have to make in reference to the first of the above classes of suits is, that whether one person as the sole proprietor, or more persons as joint proprietors, seek any relief in respect to any property, the law of limitations is the same. In the eye of the law, the whole body of proprietors is one person, and the singular includes the plural.

By these observations, I do not, by any means, intend to convey that any number of persons may join together and institute an action in respect of any property. The rules of the Procedure Code will determine who the persons are who can jointly sue. But what I mean to

convey is, that whenever, under the rules of the Procedure Code, a number of persons is entitled to sue upon a cause of action, they must sue within the same period, as is provided for in the Limitation Act in reference to a suit by a single person.

The same observations would apply to the case of one co-sharer suing for the entire joint property. It is only in some cases, (as to which we shall presently see), that one co-sharer can sue for the entire joint property. But in those few cases, the suits should be instituted within the same periods as those within which they should be instituted if the plaintiff were a single person exclusively entitled to the property. There is no difference between the two classes of suits as regards the law of limitations applicable to them.

The second of the above classes of suits may also be dismissed from our consideration with a few observations. If a single member of a family has a valid cause of action against a stranger in respect of his share in a certain family property, he must sue within the same time as is allowed to a person suing upon his right, for the recovery of the entire property. Whether a single member has a valid cause of action in respect of the share depends upon other considerations; but, supposing there can be no objection to such a suit under the rules of the Procedure Code, or upon the facts giving him a cause of action, his suit must be brought subject to the ordinary law of limitations.

The third class of suits are those in which one or more co-sharers are the plaintiffs and one or more co-sharers, alone or along with others, are the defendants. These are the suits that specially concern us in the present Lecture. The articles of Schedule II Act XV

**Limitation
specially
applicable
to joint
property.**

of 1877 which demand our attention are the following :—

Serial number.	Art.	Description of Suit.	Period of limitation.	Time from which period begins to run.
1	10	To enforce a right of pre-emption, whether the right is founded in law or general usage or on special contract.	1 year.	When the purchaser takes, under the sale sought to be impeached, physical possession of the whole of the property sold, or where the subject of the sale does not admit of physical possession, when the instrument of sale is registered.
2	41	To restrain waste.	3 years.	When the waste begins.
3	89	By a principal against his agent for movable property received by the latter and not accounted for.	3 years.	When the account is during the continuance of the agency, demanded and refused, or, where no such demand is made, when the agency terminates.
4	99	For contribution by a party who has paid the whole amount due under a joint decree, or by a sharer in a joint estate who has paid the whole amount of revenue due from himself and his co-sharers.	3 years.	The date of the plaintiff's advance in excess of his own share.

Serial number.	Art.	Description of Suit.	Period of limitation.	Time from which period begins to run.
5	107	By the manager of a joint estate of an undivided family for contribution in respect of a payment made by him on account of the estate.	3 years.	The date of the payment.
6	126	By a Hindu governed by the law of the Mitakshara to set aside his father's alienation of ancestral property.	12 years.	When the alienee takes possession of the property.
7	127	By a person excluded from joint family property to enforce a right to share therein.	12 years.	When the exclusion becomes known to the plaintiff.
8	128	By a Hindu for arrears of maintenance.	12 years.	When the arrears are payable.
9	129	By a Hindu for a declaration of his right to maintenance.	12 years.	When the right is denied.

(1) Under the repealed Limitation Act IX of 1871, time ran from "when the purchaser took actual possession under the sale sought to be impeached." Previous to Act IX of 1871, Act XIV of 1859 Sec. 1 cl. (1) also provided to the same effect.

To suits for pre-emption.

The Mahomedan Law prescribes the period

of one month, from when the sale becomes known to the pre-emptor, for a suit to enforce pre-emption.

The present law is contained in Art. 10 quoted above. In this connection you should read Secs. 7 and 17 of the Act, and note that the legislature makes no concession in favour of minors or lunatics, and does not extend the time in cases where at the accrual of the cause of action, there is no person capable of suing or being sued.

Art. 10 makes a distinction between cases in which physical possession is feasible and those in which it is not. In the latter class of cases, limitation runs from when the deed is registered. Now, we know that when the consideration for a sale is rupees one hundred or upwards, the transfer can be made only by a registered instrument, and when the consideration is below Rs. 100, the transfer may be made either by a registered instrument or by delivery of the property (See Transfer of Property Act IV of 1882, Sec. 54). In a case, therefore, where physical possession is impracticable, the transfer must be effected by a registered instrument, and the limitation would begin from the date of registration. The previous law did not contemplate the case where physical possession was not feasible.

In cases where the mortgagee was previously in possession, and the subsequent sale conveys the equity of redemption, time begins to run from the registration of the instrument conveying the equity of redemption (*Shiam Sundar v. Amanaut Begam* (1887) I.L.R., 9. All. 234). So also where a conditional sale becomes absolute by extinguishment of the right of redemption, time runs from the date when the conditional mortgagee takes possession as absolute owner (*Digambur Misser*

v. Ram Lal Roy (1887) I. L. R. 14 Cal. 761). The Allahabad Court has held that this article applies only to absolute sales and Art. 120 applies to conditional sales. Now, we have seen* that a right of pre-emption does not arise in the case of a conditional sale until the sale becomes absolute, and in this view the Calcutta decision would seem to interpret the law correctly.

If the vendor and vendee of immovable property intentionally and actively conceal the fact of sale from the plaintiff in order to deprive him of his right of pre-emption, time will not run against the plaintiff until he discovers the fraud practised upon him (*Rivaz* 50 ; also Sec. 18 Act XV of 1877).

Effect of fraudulent concealment of sale.

(2) Suits instituted by undivided parceners for injunctions to restrain their fellow parceners from wasting the common property would come under this article.

Suits to restrain waste by co-sharer.

(3) A movable property in this article is not necessarily confined to specific movable property only. Money in the hands of an agent would also come within the expression. Suits for account against managers who generally act as the agents of the other members of the family and for money would be governed by this article. But see *Muhammad Habibullah Khan v. Safdar Husain Khan* (1884) I. L. R. 7 All. 25.

Suits against managers for account.

(4) The law under Act IX of 1871 was the same. But under Act XIV of 1859 the 6 years' rule applied to suits for contribution (2 W. R. 266 and 3 W. R. 134).

Contribution suits. Previous law.

We have seen that a co-sharer by paying the entire Government revenue does not acquire a charge on the estate.† Art. 132, therefore, would not apply to a suit for recovery of the money paid

* Ante p. 201.

† Ante p. 222.

in excess of the plaintiff's own share (*Khub Lal Sahu v. Pudmanund Singh* (1888) I. L. R. 15 Cal. 542; *Achut Ram Chandra Pai v. Hari Kanta* (1886) I. L. R. 11 Bom. 313). We have also seen that under the Bengal Tenancy Act a co-sharer by such payment acquires a lien over the tenure or holding under Sec. 171 Bengal Tenancy Act. In this latter case, if the suit is to enforce the lien, the plaintiff would have 12 years under Art. 132. Otherwise Art. 120, which governs other contribution suits would apply.

(5) It has been held that where money is borrowed by the manager of a joint Hindu family on his personal security for purposes of necessity, his right to contribution arises when he expends the money, and limitation runs against his claim from that date and not from the date when he repays the loan (*Aghore Nath Mukhopadhyaya v. Grish Chundra Mukhopadhyaya* (1892) I.L.R. 20 Cal. 18.)

Suits under Mitakshara to set aside father's alienations,

(6) Private alienations of ancestral property by a father are binding on the sons when such alienations are made (1) for the benefit of the family, or (2) for the payment of any debt of the father—the debt not having been contracted for an immoral purpose. The suits contemplated in this article are suits to recover either the entire ancestral property conveyed by the father, or any portions of the same and instituted either during the father's lifetime or after his death. See *Raja Ram Tewary v. Luchmun Pershad* (1867) 8 W. R. 15; and *Munbasi Koer v. Nowrutton Koer* (1881) 8 C. L. R. 428.

The article moreover makes no distinction between movable and immovable property.

to set aside alienations by any other member.

You will further note that the article under consideration contemplates only alienations by the father, and suits to set aside alienations made by

any other member would be governed by Art. 144 which runs thus :—

Art.	Description of Suit.	Period of limitation.	Time from which period begins to run.
144	For possession of immovable property or any interest therein not hereby otherwise specially provided.	12 years	When the possession of the defendant becomes adverse to the plaintiff.

The possession of the purchaser becomes adverse from the time when he takes possession of the property purchased, *i.e.*, the cause of action arises, as under Art. 126, at the time the alienee takes possession.

(7) Act XIV of 1859 Sec. 1, cl. 13 ran to this effect :—

“To suits to enforce the right to share in any property, movable or immovable, on the ground that it is joint family-property * * * the period of 12 years from the death of persons from whom the property alleged to be joint is said to have descended, or from the date of the last payment to the plaintiff or any person through whom he claims, by the person in possession or management of some property or estate, on account of such alleged share.” In *Radhanath Dass v. Elliot* (1870) 14 M. I. A. 1; 6 B. L. R. 530 or 15 W.R., P. C., 24, the Privy Council held that this clause of Sec. I, Act XIV of 1859 contemplated suits between members of a joint family. As regards the present law, the High Court of Calcutta in *Ram Lukhi v. Durga Charan Sen* (1885) 11 Cal. 680 held that Art. 127 of Sch. 2, Act XV of 1877 applied only to suits between members of a joint family. To the same effect see *Horendra Chundra Gupta Roy v.*

Suits between co-sharers for possession.

Aunoardi Mundul (1887) I. L. R. 14 Cal. 544; and Kartick Chunder Ghuttuck *v.* Saroda Sunduri Debi (1891) I. L. R. 18 Cal. 642.

Applied to a Mahomedan family.

In Faki Abas *v.* Faki Nurudin (1891) I. L. R. 16 Bom. 191 the article was applied to a Mahomedan family. Sir Charles Sargent, C.J., said: "It may be...that the presumption that the possession of one member is on behalf of himself and all the others must necessarily be weaker in the case of Mahomedan than of Hindu family-property, and that circumstances of a less decided character might well be deemed in the former case to make the possession adverse as regards the co-sharers, but the governing principle is the same." To the same effect see Bavasha *v.* Masumsha (1889) I. L. R. 14 Bom. 70.

Conflicting decisions.

But the decision in this last case was dissented from by the Allahabad Court in Amme Raham *v.* Zia Ahmad (1890) I. L. R. 13 All. 282; by the Madras Court in Patcha *v.* Mohidin (1891) I. L. R. 15 Mad. 57; and by the Calcutta High Court in Mahomed Akram Shaha *v.* Anarbi Chowdhurani (1895) I. L. R., 22 Cal. 954.

Under Act XIV of 1859.

You will note that under the Act of 1859 in order that a member of a joint family might not lose his hold on the family-property it was necessary for him to receive periodically something from out of the income of the family-property. Act IX of 1871 changed the law. Art. 127 of that Act ran thus:—

Under Act IX of 1871.

Art.	Description of Suit.	Period of limitation.	Time when period begins to run.
127	By a Hindu excluded from joint family-property to enforce a right to share therein.	12 years	When the plaintiff claims and is refused his share.

While the above was the law, practically there was no limitation to an action by a Hindu excluded from joint family-property. He might, by simply deferring to claim his share, get an indefinite time to sue.

The present law requires that the plaintiff must come to Court within 12 years of the time when his exclusion from joint family becomes known to him. Now, there are various ways by which a man may know of his exclusion from property. He may make a demand and be refused. His co-sharers may, by their acts, even if he makes no demand, inform him of their having excluded him from the property. *Kane Bable v. Antaji Gangadhar* (1886) I. L. R. 11 Bom. 455.; *Dinkar Sadashiv v. Bhikaji Sadashiv* (1887) I. L. R. 11 Bom. 365.

Present law.

It would seem that the exclusion contemplated by this article is "total exclusion from the family-property."

We have already seen* that in a joint family the possession of a property by one member of the family is not inconsistent with the possession of the rest. From the mere fact of receipts for rent being issued in the name of one member, or even of the title deeds in respect to any property being in the name of one member, no inference adverse to the other members ought to be drawn.

Possession of one is possession of family.

It often happens that in a joint family, some of the members live in their ancestral dwelling house enjoying the profits of the family-property, while others live abroad holding lucrative appointments under the Government, or carrying on independently some profitable trades. These members who live abroad are by no means excluded from the family-property. Thus in *Ram Lakhi v. Durga*

* Ante pp. 92-93.

Charan Sen, I.L.R., 11 Cal. 680, Sir Richard Garth, C. J., says: "Those persons (meaning the Hindus) often leave their houses for long periods of time to seek employment in some distant place, and their relatives may take steps to exclude them from their family-property without their knowing it. It has, therefore, been considered right to allow them to bring a suit under such circumstances to enforce their right within 12 years from the time when they first know of their exclusion."

The law presumes that when any property is shewn to have been at one time joint family-property, the possession of one member in the joint family is the possession of all. See Taruck Chunder Poddar, *v.* Jodeshur Chunder Koondoo (1873) 11 B. L. R. 193; 19 W. R. 178; Asud Ali Khan *v.* Akbar Ali Khan (1877) 1 C. L. R. 364 and Rakhal Das Bundopadhya *v.* Indrumonee Debi (1877) 1 C. L. R. 155. But whenever one member of a joint family is in exclusive possession of a property, it lies on the other members to explain away this circumstance. Thus in Lachiram *v.* Uma I. L. R., 11 Bom. 222, Justice West observes: "When of two persons one is in enjoyment of property and the other has no enjoyment or possession, that is *prima facie* an exclusion of the latter. There may be a contract or other jural relation between the parties which accounts for the sole possession and makes it preserve, instead of destroying, the joint right, but of such a state of things positive evidence is always required, since otherwise, possession continued even for centuries would afford no security to property." To the same effect see Ram Chandra Narayan *v.* Narayan Mahadev (1886) 1 I. L. R. 11 Bom. 216 and the cases therein cited. Now, in order to see whether a claim on the ground of joint property is barred by limitation, a Court

must assume that the plaintiff's title is correct, and then find whether (1) as a fact he was excluded for more than 12 years before suit and (2) whether he was aware of such exclusion. Now the exclusion must be by an act of the co-sharer defendants in reference to the plaintiff. It follows, therefore, that unopposed possession of a co-sharer over a particular property cannot be looked upon as adverse possession or as possession by excluding another co-sharer. In the majority of cases this will be merely a question of fact.

You should note that the article makes no distinction between movable and immovable property.

Law same for movables and immovables.

Let us now consider the rules of procedure specially applicable to suits in relation to joint property. As I have said before, I do not propose to give you a summary of all the law that has to be applied in relation to these suits. That is not the object of these Lectures and I shall not therefore make any attempt to accomplish such a feat within the compass of these Lectures. The rules of procedure for suits in general are numerous, and they apply generally to suits in relation to joint property. I shall here consider only those rules that have special bearing on joint property.

Rules of Procedure.

The Sections of the Civil Procedure Code Act XIV of 1882 that have reference to our present subject are 26, 28, 31, 32, and 35. They are given in the foot notes.*

* "26. All persons may be joined as plaintiffs in whom the right to any relief claimed is alleged to exist, whether jointly, severally or in the alternative, in respect of the same cause of action. And judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment. But the defendant, though unsuccessful, shall be entitled to his costs occasioned by so joining any person who is not found entitled to relief, unless the Court, in disposing of the costs of the suit, otherwise directs.

Parties to suits for joint property under Mitakshara.

All coparceners to sue.

Exception.

In an undivided family under the Mitakshara law, the family-property belongs jointly to all the coparceners. A suit, therefore, in respect of such property must be instituted by all the persons interested *i. e.*, by all the coparceners. The only exception to the rule is when some of the coparceners refuse to join the others who intend to sue and are thereupon made defendants, or where they have acted prejudicially to the interest of the entire body of coparceners. Thus in *Dwarka Nath Mitter v. Tara Prosunna Roy* (1889) I. L. R. 17 Cal. 160, the Court observed; "We have no doubt that it is only when the plaintiffs can show that those entitled to join with them have refused to join or have otherwise acted prejudicially to their interests, that they are entitled to sue alone and to make the

Sec. "28. All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter. And judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities without any amendment.

Sec. "31. No suit shall be defeated by reason of the misjoinder of parties, and the Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

Sec. "32. The Court may, on or before the first hearing, upon the application of either party, and on such terms as the Court thinks just, order that the name of any party, whether as plaintiff or as defendant, improperly joined, be struck out; and the Court may at any time either upon or without such application, and on such terms as the Court thinks just, order that any plaintiff be made a defendant or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added.

No person shall be added as a plaintiff, or as the next friend of a plaintiff, without his own consent thereto.

Sec. "35. When there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding under this Code; and in like manner when there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any such proceeding."

reluctant or refusing co-sharers defendants to the suit. As authority for this we may refer to the case of *Luke v. South Kensington Hotel Co.*, L. R., 11 Ch. D. 121; and also the cases of *Patihari-pat Krishnan Unni Nambiar v. Chekur Manakkal Nilakandan Bhattathiripad*, I. L. R. 4 Mad. 141; and *Kalidas Keval Das v. Nathu Bhagvan*, I. L. R. 7 Bom. 217; and we may further refer to *Ram Sebuk v. Ramlall Koondoo*, I. L. R. 6 Cal. 815. In the case of *Prem Chand Lusker v. Mokshoda Debi*, I. L. R. 14 Cal. 201, it was expressly stated that the co-sharers of the plaintiffs had refused to join in the suit." To the same effect see *Parameswaran v. Shangaran* (1891), I.L.R. 14 Mad. 489; *Arunachala Pillai v. Vythialinga Mudaliyar* (1882), I. L. R. 6 Mad. 27.

It is also clear that so long as the family is undivided and the property joint, no single coparcener has a right to any definite share. It follows from this that in respect of any aliquot fraction of the family property no suit would lie at the instance of any but the whole body of joint proprietors. Thus in *Rajaram Tewaree v. Luchmun Pershad* (1869) 12 W. R. 478, Sir Barnes Peacock, C. J., said: "The right of action has been misconceived and the proper persons have not been made parties. The suit should have been brought by all the joint owners to set aside the deed as to the charge created by Oodit, as well as to the charge created by Jeetun; and the suit should have been brought by all the members of the joint family, and not by two of them alone who before partition have no definite share. If the deed were to be set aside, it would be impossible by the decree to define the share which the plaintiffs are entitled to recover, so long as the property is joint. If the other members of the joint family refused to join as

No suit for share of joint property under Mitakshara against trespasser before partition.

When
plaintiff can
sue as
manager.

plaintiffs they might have been made defendants in the suit." In *Balkrishna Moreshwar Kunte v. The Municipality of Mahad* (1885) I. L. R. 10 Bom. 32, Sargent, C. J., said: "The general rule is that 'unless there is a special provision of law, co-owners are not permitted to sue through some or one of their members, but that' all must join in a suit to recover their property; nor can the defendant be deprived of his right to insist on the other co-owners being joined on the record by reason of there being evidence to show that they approve of the suit being brought by the plaintiff alone." In *Hari Gopal v. Gokal Das Kushabashet* (1887) I. L. R. 12 Bom. 158, the plaintiff as manager of an undivided Hindu family sued to recover possession of certain lands from the defendant. The defendant contended that the plaintiff's minor brother and uncle who were his undivided coparceners should be made parties to the suit. The first Court, holding that the plaintiff alone could sue, passed a decree for the plaintiff, but the first appellate Court reversed that decree. In second appeal Sir Charles Sargent, C. J., in concurrence with Justice Nanabhai Haridas, held that the defendant was entitled to have the plaintiff's uncle and minor brother placed on the record either as plaintiffs or as defendants and that "the right of a plaintiff to assume the character of manager, and to sue in that character, raises a question, of fact and law which varies as the other members of the family are minors or adults,and therefore, the defendant is always entitled in such suits when the objection is taken at an early stage to have the other members of the family, when they are known, placed on the record to ensure him against the possibility of the plaintiff's acting without authority." In *Kattusheri*

Pishareth v. Vallotil Manakel (1881), I. L. R. 3 Mad. 234 it is said: "Unless where, by a special provision of law, co-owners are permitted to sue through some or one of their members, all co-owners must join in a suit to recover their property. Co-owners may agree that their property shall be managed and legal proceedings conducted by some or one of their member but they cannot invest such person or persons with a competency to sue in his own name on their behalf, or, if sued, to represent them. It may, indeed, happen that a suit by one of several co-owners can be successfully maintained against a tenant. This is the case when the tenant has dealt with such co-owner as sole landlord and, by so dealing, is estopped from denying the title of the person who has let him into possession."

The rule of English Law is that all persons having a joint interest must join in an action at law, but in equity it is sufficient if all interested in the subject of the suit should be before the Court either as plaintiffs or defendants, *Wilkins v. Fry*, 1 Mer. 262; *Sandes v. Dublin Tramway Co.* 12 L. R. (Irish), 206; *Guru Prashad Roy v. Ras Mohun Mukhopadhyay* 1 C. L. R. 431.

Rule in England in suits for joint interest.

The reason of the rule in equity is that no person can compel another against his will to join him as plaintiff. If, therefore, suits for the recovery of joint property could not lie except at the instance of all the persons entitled to the property, a co-sharer might often find it extremely difficult for him to obtain redress in a court of justice. Courts, therefore, allow co-sharers to sue for the whole property, when it is shewn that the absent co-sharers were asked to join as plaintiffs but declined, and they have been accordingly made defendants.

Reason of the exception.

Suits by sharers in Dayabhaga or Mahomedan family.

But in a Dayabhaga or a Mahomedan family, the shares of the several members interested being definite even before an actual partition, one or more co-sharers may sue a trespasser in respect of his or their own shares. Such suit when for possession of shares must be for possession jointly with the trespasser.

After decree upon joint liability against some co-sharers, others cannot be sued.

Let us next consider the procedure applicable to a suit *against* the members of a coparcenary. It is clear that in a Mitakshara coparcenary, the liability of the coparceners, in all that concerns the family, is joint. A suit, therefore, may lie against all the coparceners or against some of them in respect of a joint family-liability. But when a plaintiff sues and obtains a decree against some of the coparceners only, in respect of a joint liability of the family, the law would not allow him afterwards to sue the other coparceners or any of the whole body, in respect of the same cause of action. See *King v. Hoare* 13 M. & W. 494; *Brinsmead v. Harrison*, L. R., 7 C. P., 547; *Kendall v. Hamilton* L. R., 4 App. cases 504; *Hemendro Coomar Mullick v. Rajendro Lall Moonshee* (1878) I. L. R. 3 Cal. 353; *Rahmubhoy Hubibbhoy v. Turner* (1890) I. L. R. 14 Bom. 408. These cases lay down the same principles in cases arising out of a breach of a joint contract as in those where the liability arises out of a tort.

Suits by single co-sharers for enhancement of rent or ejectment.

In the preceding Lecture,* I discussed the question of the rights of individual co-sharers to sue for enhancement of rents payable by tenants on *ijmali* land, as well as their rights to sue for ejectment from tenures and holdings.

Procedure in suits for contribution.

You will remember that in suits for contribution, all the co-sharers of the plaintiffs must be made defendants,† and the plaintiffs must state and

Ante p. 234.

† Ante p. 223.

prove their respective liabilities. The decree in such suits should also set out the respective liabilities of the defendants. I have already dwelt on the question of the jurisdiction of courts to try such suits.*

In suits to enforce the right of pre-emption the co-sharer (vendor) and the vendee must be made defendants. Such suits should be valued according to para VI Sec. 7 of the Court Fees Act VII of 1870, at the value (computed according to para. V preceding) of the land, house or garden in respect of which the right is claimed.

Parties to pre-emption suits and valuation thereof under Court Fees Act.

Suits to enforce right to share in any property on the ground that it is joint family-property have to be valued under Sec. 7 para. IV sub-para. (b) of the Court Fees Act, according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

Valuation of suits for shares of family-property under Court Fees Act.

Suits relating to maintenance are not cognizable in the Mofussil Courts of Small Cause, (*vide* Art. 38 sch. 2 of Act IX of 1887) and such suits should be valued under Sec. 7 para. II of the Court Fees Act at the value of the subject matter of the suit, such value being determined to be ten times the amount claimed to be payable for one year. When maintenance is claimed as a charge, on, or by reason of, some joint or ancestral property (and that is the only case with which we are concerned in these Lectures), the Presidency Small Cause Courts would not have jurisdiction to try them (*vide* Secs. 18 & 19 Act XV of 1882).

Of suits for maintenance. Jurisdiction

A suit for partition has to be instituted on a Court Fee stamp of Rs. 10 under Art. VI cl. 17 sch. 2 of Act VII of 1870. It seems that when the plaintiff's right to the share claimed is admitted, and the object of the suit is merely to have a

Valuation of partition suits under Court Fees Act.

partition by metes and bounds, the plaint may be admitted on a Court Fee stamp of Rs. 10. If the extent of plaintiff's interest be not admitted, the Court may treat the suit as one for declaration of plaintiff's right and for partition. In such a case the plaint should be stamped upon the money-valuation as in an ordinary suit.

**Valuation of
such suits
for jurisdic-
tion.**

In Madras, in suits for the partition of coparcenary property under the Mitakshara Law, the value of the whole property and not of the share claimed determines the jurisdiction. See *Vydinatha v. Subramanya* (1884) I. L. R. 8 Mad. 235. In such suits the share of every parcener is determined and not merely that of the plaintiff. The Madras Courts draw a distinction between such suits and those in which the plaintiff simply claims to be declared an heir and seeks possession of his share from the defendants. They hold that in these latter cases the proper value of the suit is the value of the share claimed. See *Khansa Bibi v. Syed Abba* (1887) I. L. R. 11 Mad., 140; followed in *Ramayya v. Subbarayuda* (1889) I. L. R. 13 Mad., 25. In the same way in Bengal when the plaintiff seeks to recover possession of his share he must value the suit at the value of his share; and where he is in possession and prays for a partition, the value of the whole property under partition determines the jurisdiction of the Court. See *Kirty Churn Mitter v. Aunath Nath Deb* (1882) I.L.R. 8 Cal. 757; followed in *Boidyanath Adya v. Makhan Lal Adya* (1890) I. L. R. 17 Cal. 680.

**Views of
the Bombay
Court.**

But the Bombay High Court has ruled that in partition suits when the plaintiff claims a definite share on partition, the value of such share determines the jurisdiction of the Court. Thus in *Lakshman Bhatkar v. Babaji Bhatkar* (1883) I. L. R. 8 Bom. 31, Justice West, in concurrence with Justice Nanabhai Haridas, is reported to

have said: "It has been contended that the subject matter of a partition suit by one who claims his share from the other coparceners is the whole joint estate. In a sense this is so. The land and goods as a whole are the material substratum of the proprietary right, a part of which the plaintiff seeks to enforce. But in the sense of the Act, we think, the subject matter is the jural relation between the parties as alleged by one and denied by the other, and that, in the case of a single aliquot part, is the ownership of such part. Materially this is embraced in the aggregate estate, which is thus itself also the subject matter, but more remotely, and not in a sense conformable to that in which subject matter must be understood in analogous cases."

The view taken by the Calcutta Court of the effect of a decree in partition suit will appear on reference to the judgment of Justice Ainslie in *Sheikh Khoorshed Hossein v. Nubbee Fatima* (1877) I. L. R. 3 Cal. 551. That learned judge said. "We are of opinion that a decree for partition is not like a decree for money or for the delivery of specific property, which is only in favour of the plaintiff in the suit. It is a joint declaration of the rights of persons interested in the property of which partition is sought, and having been so made, it is unnecessary for those persons who are defendants in the suit to come forward and institute a new suit to have the same rights declared under a second order made. It must be taken that a decree in such suits is a decree, when properly drawn up, in favor of each shareholder or set of shareholders having a distinct share."

Effect of
decree in
partition
suit.

The view taken by the Allahabad High Court of the effect of a decree in an ordinary suit for partition of plaintiff's own share of joint family-property is different from that propounded by

When plain-
tiff's share
only is se-
parated.

Views of
the Allaha-
bad Court.

Justice Ainslie in Khoorshed Hossein's case. Thus in *Hikmat Ali v. Waliunnessa* (1889), I. L. R. 12 All. 506, Sir John Edge, C. J., in concurrence with Justice Tyrrell, said: "we may say with regard to that case (*Khoorshed Hossein v. Nubbee Fatima*) that, should the question in that case arise, we would not be prepared to follow that decision.It is not necessary for us to consider whether, in a suit for partition framed differently to that before us, a decree could be passed partitioning the shares of the defendants *inter se* which might operate as *res judicata* in a subsequent suit. In this suit we understand no partition among the defendants *inter se* was prayed for." The decision of the Court was that the value of the plaintiff's share determined the jurisdiction of the Court.

On a close examination of the above cases it would appear that there is really no conflict. If the object of the suit be merely to separate the share of the plaintiff from that of the defendants, and not to effect a division among the defendants, (and there is no doubt that such a suit would lie), the jurisdiction of the Court should be determined according to the value of the plaintiff's share. Of course, if the object of the suit be to allot distinct portions to all the sharers (as in *Khoorshed Hossein's case*) the whole property should be taken to be the subject of the suit.

Receiver in
partition
suits.

Partition proceedings are generally dilatory, and considerable delays take place when any co-sharer fails to punctually pay in his quota of the costs. Whenever, therefore, a Court wishes to complete the proceedings within the shortest time possible, it appoints a receiver and places him in charge of the property with instructions to defray the expenses of the partition from out of the rents and profits collected by him. This

course is adopted, particularly in those cases where the co-sharers are not in good circumstances.

Then again, by the appointment of a receiver the property under partition is secured against the risk of being sold up for arrears of revenue or rent. The receiver meets these demands together with the costs of the partition proceedings on behalf of all the co-sharers who are liable for the same in proportion to their several interests.

The following is a schedule of costs ordinarily allowed in the Original Side of the Calcutta High Court, in an ordinary suit for partition where the value of the entire property under partition does not exceed Rs. 10,000.

Attorney's Fees.

	Rs.	A.	P.
Attendances for obtaining commission ...	10	0	0
Attending meeting of commissioner, including service of notice, each ...	25	0	0
(Not to exceed on the whole Rs. 100.)			
Instructions to confirm return ...	5	0	0
Drawing and engrossing notice ...	5	15	0
Copying same for service ...	0	15	0
Service ...	2	0	0
Affidavit of service ...	5	15	0
Swearing same ...	2	0	0
Obtaining certificate of return filed ...	2	0	0
Briefing papers for counsel ...	10	0	0
Attending counsel with brief ...	2	0	0
Attending court when application made ...	10	0	0
Filing papers ...	1	0	0
Obtaining and sealing order ...	2	0	0
Serving same and copy ...	2	15	0
Affidavit of service ...	5	15	0
Swearing same ...	2	0	0
Filing same ...	1	0	0

Counsel's Fees.

			Rs.	Λ.	P.
Application to confirm return	...	...	17	0	0

Registrar.

Commission of partition	...	...	5	0	0
Filing return	...	...	5	0	0
Order to confirm return, including all other charges	...	...	15	0	0

Commissioner &c.

Commissioner	160	0	0
Surveyor	...	...	80	0	0
Interpreter and clerk.	...	...	40	0	0

LECTURE VIII.

Impartible Joint Property.

Impartible estate, what—Rules of succession determined by custom—Estates to be presumed partible—What is necessary to be proved to show impartible character—Evidence to establish custom—Incidents of such estates under the Mitakshara—Son acquires no property by birth—Son cannot control father's alienations—Alienability to be presumed—Inalienability depends on custom—Rules of primogeniture apply in absence of custom—Impartible estates under Dayabhaga—Power over income—Earnings and property purchased therewith divisible—Destruction of customary law—Hunsapar Raj case—Shivagungh case—Nuzvid case—Madras Regulation XXV of 1802—Mirangi case—Bengal Regulation XI of 1793—Regulation X of 1810—Effect of the Regulations—Principality or Raj—Maintenance allowances—Suranjams of Bombay.

We have seen that even in an undivided Hindu family governed by the Mitakshara or the Dayabhaga law, and possessed of joint property, some members may own property belonging exclusively to them. Such property would not be taken account of at a general partition of the family-property, *e. g.*, gains of science learnt without detriment to ancestral property, gifts of affection, recovered ancestral property when the recovery is made without spending any money out of the ancestral estate, &c., &c. All such properties are considered the exclusive properties of the acquirer, and are, therefore, not partitioned or divided at a general partition of the family-property. We have also seen that in a Hindu family possessed of ancestral property, some members may jointly inherit, by collateral succession, property to which the other members of the coparcenary would not be entitled, and that as to such property the principles of

survivorship would have no place, though when such property is inherited jointly by a number of persons in defined shares, their shares are always capable of actual division. In the same way, clothes and wearing apparel of individual members are excluded from partition: they are allowed to belong to the persons who use them. Wells are also mentioned by our ancient law-givers among this class of property.

The above are several descriptions of property which, though *in their nature* impartible, are not allowed by the law to be divided among the coparceners at a general partition.

Impartible
estate,
what.

There is another class of property which, independently of the personal law of the holder, are impartible by the terms under which they were created, or, by custom,—being only capable of enjoyment by one person at a time. In the case of several such estates, their origin and the terms of their creation have only to be inferred from a long uninterrupted mode of enjoyment. Such estates when belonging to an undivided Hindu family are looked upon as the joint property of the family—the members other than the person in enjoyment being entitled to maintenance from the income. It may be asserted of these estates, that long established custom always governs the rules of succession to them, and determines the extent of the power of alienation possessed by the owner for the time being, and that rules of primogeniture and of exclusion of females generally obtain in such estates.

Rules of
succession
determined
by custom.

Estates to
be pre-
sumed
partible.

In all cases, the presumption will be that an estate is partible and the party alleging it to be impartible will have to prove by very clear evidence, not only that the estate was never before partitioned, but also, that one person only enjoyed

it at a time. In *Shankar Baksh v. Hardeo Baksh* (1888) I. L. R. 16 Cal. 397, Lord Hobhouse, in delivering the judgment of the Judicial Committee observed: "The ordinary rule is that if persons are entitled beneficially to shares in an estate, they may have a partition." In *Thakur Duriyao Singh v. Thakur Dari Sing* (1873) 13 B. L. R. 165, Sir James Colville, in delivering the judgment of the Privy Council, said: "In the present case there was no evidence of *enjoyment* by a single member of the family during six or seven generations—all that was found was that during that period the estate had never been divided. That fact alone cannot control the operation of the ordinary rule of Hindu law, or deprive the parties, if members of a joint and undivided family, of the right to demand a partition when they are so minded."

What is necessary to be proved to shew impartible character.

As to the nature of the evidence that must be adduced to establish a custom overruling a positive direction of law, their Lordships of the Privy Council in *Rama Lakhshmi Ammal v. Sivanantha Perumal* (1872) 12 B.L.R. 396 remarked: "Their Lordships are fully sensible of the importance and justice of giving effect to long established usages existing in particular districts and families in India, but it is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence. It is only by means of such evidence that the Courts can be assured of their existence, and that they possess the conditions of antiquity and certainty on which alone their legal title to recognition depends." To the same effect are the observations of Sir Robert Collier in *Adrishappa v. Gurushidappa* (1880) I. L. R. 4 Bom. 494.

Evidence to establish custom

Incidents of
such estates
under
Mitakshara.

Let us now consider some of the incidents of these impartible estates under the Mitakshara Law.

Under that law, a son by birth acquires an interest with his father in ancestral property and can prevent him from alienating it except for certain allowable purposes. At one time it was thought that in the case of impartible estates too, the son by birth acquired such rights, and could interfere with his father's alienations as of right. Thus in *Rajah Yenumula Gavuri Devamma Garu v. Rajah Yenumula Ramandora Garu* (1870) 6 Mad. H. C. Rep. p. 93, it was held that the special rule of succession, entitling the eldest of the next of kin to take solely, does not interfere with the general rules of succession further than to vest the possession and enjoyment of the corpus of the whole estate in a single member of the family, subject to the legal incidents attached to it as the heritage of an undivided family. Chief Justice Scotland and Justice Innes said: "The unity of the family right to the heritage is not dissevered any more than by the succession of coparceners to partible property; but the mode of its beneficial enjoyment is different. Instead of several members of the family holding the property in common, one takes it in its entirety, and the common law rights of the others who would be coparceners of partible property, are reduced to rights of survivorship to the possession of the whole, dependent upon the same contingency as the rights of survivorship of coparceners *inter se* to the undivided share of each; and to a provision for maintenance in lieu of coparcenary shares" (see p. 105). And again (p. 109) "We are of opinion that the sound rule to lay down with respect to undivided or impartible ancestral property is, that all the members of the family who, in the

way we have pointed out, are entitled to unity of possession and community of interest according to the Law of Partition, are co-heirs, irrespectively of their degrees of agnate relationship to each other, and that, on the death of one of them leaving a widow and no near Sapindas in the male line, the family heritage both partible and impartible, passes to the survivors or survivor to the exclusion of the widow. But when her husband was the last survivor, the widow's position as heir relatively as to his other undivided kinsmen, is similar to her position with respect to his divided or self and separately acquired property." This decision was passed in 1870. Mark now the gradual change in the law. In *Thakur Kapil Nauth Sahai Deo v. Government* (1874) 13 B. L. R. p. 445, Government having confiscated the property of Bishnath, who was declared a rebel,—the property having been an impartible estate which according to the family custom descended by the rules of primogeniture,—his son Kapil Nauth instituted the suit for recovery of the property on the allegation, among others, that under the Mitakshara law which governed the family, he was an undivided coparcener with his father. In disposing of this contention Sir Richard Couch, C. J., observed: "The question appears to be reduced to this:—Is the law of Mitakshara, by which each son has by birth a property in the paternal or ancestral estate (Ch. I sec. IV. 27), consistent with the custom that the estate is impartible, and descends to the eldest son? The property by birth gives to each son a right to compel the father to divide the estate—*Rajaram Tewari v. Luchmun Persad* and *Nagalinga Mudali v. Subbiramaniya Mudali* which is inconsistent with the estate being impartible. On the father's death, the whole estate goes

**Kapilnauth
Sahai Deo v.
Govern-
ment.**

No property by birth.

to the eldest son, and the property by birth in the others has no effect. Property by birth in such an estate is a right which can never be enjoyed by the younger sons. It is not only not necessary to secure the descent to the eldest son, but if it had effect in respect of the younger sons it would prevent it. This part of the Mitakshara law cannot be reconciled with the custom, and we think we should hold that it is not applicable to this estate." This decision, however, did not settle the law. For, in *Doorga Persad Sing v. Doorga Konwari* (1878) I. L. R. 4 Cal. p. 190 the Judicial Committee in 1878 held, that the impartibility of property did not *per se* destroy its nature as joint family-property, or, render it the separate estate of the last holder so as to destroy the right of another member of the joint family to succeed to it upon his death in preference to those who would be his heirs if the property were separate. In 1883 the Allahabad Court in the case of *Bhawani Ghulam v. Deoraj Kuari* (1883) I. L. R. 5 All. 542 held that where there was no local or family custom overriding the general law, the succession to a Raj or impartible zemindari according to Hindu law goes by primogeniture. In the absence of any custom to the contrary, a Raj or impartible zemindari is according to Hindu law, not separate property but joint family-property, and, as such, according to the Mitakshara law is not alienable by any member of the family save for urgent and necessary expenses of the family without the consent of the coparceners.

These were the earlier decisions; you will now mark the great departure made in 1888. In that year in the case of *Sartaj Kuari v. Deoraj Kuari*, I. L. R. 10 All. p. 272, Sir Richard Couch who as Chief Justice of Bengal in the year 1874 in

the case of *Kapilnauth Sahai Deo v. Government* held that the Mitakshara theory of right of sons by birth did not apply to these cases of impartible estates delivered the judgment of the Judicial Committee. The suit was by the son to set aside the gift of some mouzas made by his late father. Sir Richard Couch in the course of the judgment said: "It was admitted that the Raj or estate was impartible; that there was in the family the custom of primogeniture; and that the family was governed by the law of the Mitakshara." His Lordship, upon the question which we are now considering, said—"The property in the paternal or ancestral estate acquired by birth under the Mitakshara law is, in their Lordship's opinion, so connected with the right to a partition that it does not exist where there is no right to it. In the *Hunsapore* case there was a right to have Babuana allowances, as there is in this case, but that was not thought to create a community of interest which would be a restraint upon alienation. By the custom or usage, the eldest son succeeds to the whole estate on the death of the father, as he would if the property were held in severalty. It is difficult to reconcile this mode of succession with the rights of a joint family and to hold that there is a joint ownership which is a restraint upon alienation." Their Lordships in conclusion seemed to think that the power of alienation was to be presumed to exist in such cases, and those who contended that no such power existed had to establish the custom of inalienability.

Son cannot control father's alienations.

Alienability to be presumed.

Inalienability depends on custom.

To the same effect see *Beresford v. Rama Subba* (1889) I. L. R. 13 Mad. 197.

I have not in this connection quoted the observations of the Privy Council in the Bengal case of *Nil Kristo Deb Barmano v. Bir Chandra Thakur* 3 B.L.R., P.C. 13, made in 1869. Those observa-

tions accord well with the view taken in this later Allahabad case. Their Lordships said—"when a Raj is enjoyed and inherited by one sole member of a family, it would be to introduce into the law, by judicial construction, a fiction involving also a contradiction, to call this separate ownership, though coming by inheritance at once sole and joint ownership, and so to constitute a joint ownership without the common incidents of coparcenership. The truth is, the title to the throne and the royal lands is, as in this case, one and the same title; survivorship cannot obtain in such a possession from its very nature and there can be no community of interest; for, claims to an estate in lands, and to rights in others over it, as to maintenance for instance, are distinct and inconsistent claims."

Rules of
primogeniture apply
in absence
of custom.

We have already seen that custom determines the rules of succession to these impartible estates. In the absence of any custom the rules of primogeniture apply. *Bhawani Ghulam v. Deoraj Kuari* (1883) I. L. R. 5 All. 542. In *Jogendra Bhupati Hurro Chundra Mahapatra v. Nityanand Man Sing* (1890) I. L. R. 18 Cal. 151, Sir Richard Couch in delivering the judgment of the Judicial Committee observed—"the fact of the Raj being impartible does not affect the rule of succession. In considering who is to succeed on the death of the Raja, the rules which govern the succession to a partible estate are to be looked at."

We have also seen that in such cases the younger members receive allowances (called *Ba-booana* allowances), but their Lordships of the Privy Council in *Sartaj Kuari v. Deoraj Kuari* (1887) I. L. R. 10 All. p. 272, thought that the right to receive maintenance did not create a community of interest which would be a restraint upon alienation.

The law would be the same under the *Dayabhaga* which advocates exclusive ownership. In *Udaya Aditya Deb v. Jadub Lal Aditya Deb* (1881) I. L. R. 8 Cal. 199, it was held that the impartibility of a *Raj* did not make it inalienable.

Under
Dayabhaga.

The holder of an impartible estate may, even where immemorial custom would restrain his power of alienation as regards the *corpus*, spend all the income derived from the estate. For, he need not effect any savings. If, therefore, he effects any savings they belong to him absolutely. If he buys any property with such savings, such property would be at his absolute disposal during his lifetime, and after his death would be inherited according to the *kulachar* or custom which obtains in the family relative to the succession to such property. Of course, it is open to the possessor of the impartible estate for the time being to treat the savings, or the property purchased with the savings, as part of the impartible estate. In *Rajeswara Gajapaty Naraina Deo v. Rudra Gajapaty Naraina Deo* (1869) 5 Madras H. C. Rep. p. 31, Chief Justice Scotland in concurrence with Justice Innes is reported to have said: "The established rule which takes ancient zemindaries out of the general law of partition and succession is, we think, strictly limited to the *corpus* of the land and other immovable property forming the estate of the zemindary, and such movable property as by customary descent may have become an heritage appurtenant thereto." And again, "whether regarded as the separately acquired funds of the zemindar, or, as it really is, his acquisition derived from ancestral property owned by him solely, it is equally divisible family property as between his sons, the plaintiff and defendant. It was said in argument on behalf of the defendant that if the division of this fund were allowed,

Power
over in-
come.

Savings
and pro-
perty pur-
chased
therewith
divisible.

sons might call upon their father for a share of his savings as often as he made them ; but that clearly they could not do. The law vests the whole proprietary right to the zemindary in the person who succeeds to it, and consequently he alone possesses the title to the rents and profits of the estate."

**Destruction
of custom-
ary law.**

I have in this Lecture quoted certain observations of their Lordships of the Privy Council as to the nature of the evidence to establish a custom overriding a positive rule of law. As to the destruction of such a custom by non-user or discontinuance, the following observations were made in *Raja Raj Kishen Singh v. Ramjoy Surma Mozoomdar* (1872) 19 W. R. 8, "Their Lordships cannot find any principle or authority for holding that in point of law a manner of descent of an ordinary estate depending solely on family usage may not be discontinued so as to let in the ordinary law of succession. Such family usages are in their nature different from a territorial custom which is the *lex loci* binding all persons within the local limits within which it prevails. It is of the essence of family usages that they should be certain, invariable and continuous ; and well established discontinuance must be held to destroy them. This would be so when the discontinuance has arisen from accidental causes ; and the effect cannot be less when it has been intentionally brought about by the concurrent will of the family. It would lead to much confusion and abundant litigation, if the law attempted to revive and give effect to usages of this kind after they had been clearly abandoned and the abandonment had been long acted upon."

In deciding whether an estate is partible or impartible, Courts have frequently to consider the terms of the deeds, if any, whereby such

estate was created, or, where there were no formal deeds executed, the circumstances under which it came into existence. In interpreting the deeds and circumstances, considerable light is thrown by a long established custom.

In the Hunsapore case—Babu Beerpertab Sahee *v.* Maharaja Rajender Pertab Sahee (1868) 12 M. I. A. I., 9 W. R. P. C. 15—the estate was confiscated in 1767 and kept by Government in their possession until 1790 and then granted in that year to a younger member of the family on whom the title of Raja was afterwards conferred. Their Lordships observed that there was no fresh Sanad granted and the question was whether it was a fresh grant of the family Raj with its customary rule of descent or merely a grant of the lands formerly included in the Raj to be held as an ordinary Zemindary, and it was held that it was the intention of the Government to restore the Zemindary as it existed before the confiscation and that the transaction was not so much the creation of a new Zemindary as the change of the tenant by a *vis major*.

Hunsapore
Raj case.

In the Shiva-Gungah case—Kattama Nauchear *v.* The Raja of Shiva-Gungah (1863) 9 M. I. A. 539, Suther. P. C. Judgments p. 520 ; 2 W. R. P. C. 31—the estate was granted by a proclamation in 1801 and there was a sanad granted in 1803 which besides containing the usual terms of such documents of permanent settlement, contained a clause authorizing the Zemindar to transfer without the authority of Government, all or any part of the Zemindari. Their Lordships observed that every thing pointed to the installation of the istemrari Zemindar, not merely as proprietor but as ruler of the district, and that the policy of the Government clearly was to appoint a new ruler whom the rebellious inhabitants would obey:

Shiva-
Gungah
case

that the policy of the permanent settlement was applied to the Shiva-Gungah as well as to other estates, but that if there were any general intention of introducing the principle of partibility, it was certainly not followed in that instance.

**Nuzvid
case.**

In the Nuzvid case *Raja Venkata Rao v. the Court of Wards* (1879) 1 L.R. 2 Mad. 128, their Lordships of the Privy Council said: "In the former state of things indivisibility and impartibility and descent to a single heir were the ancient nature of the tenure, and with good reason when the estate was subject to military services and under the Government of a chieftain, and was in the nature of a Raj or principality; but when the ancient Zemindari was resumed and two new estates were created out of it of which the Zemindars ceased to be liable to military service, or to be independent chiefs, but held merely as ordinary Zemindars subject to the payment of a fixed assessment of revenue, there was no reason why the rule of impartibility or descendibility to a single heir, according to the rule of primogeniture, should be extended to the newly created estates."

**Madras
Reg. XXV
of 1802.**

Upon the passing of the Madras Reg. XXV of 1802, which fixed the assessments on Zemindaries in perpetuity, sanads were granted to Zemindars, but these did not change the previous impartible character of the Zemindaries. In *Yarlagaddu Mallikarjuna v. Yarlagaddu Durga* (1890) 1 L. R. 13 Mad. 406.; L. R. 17. I. A. 13 their Lordships of the Judicial Committee held that the question whether an estate was impartible and descended by the law of primogeniture, or was subject to the ordinary Hindu law of inheritance, must be decided in each case upon the evidence given in it, and that notwithstanding the issue of sanads under Reg. XXV of 1802 estates continued to be impartible as before.

In *Satrucharla Jogannadha Razu v. Satrucharla Ram Bhadra Razu* (1891) I. L. R. 14 Mad. 237 ; L.R. 18 I.A. 45, their Lordships of the Privy Council held the Morangi zemindari to be a partible estate although at one time it was impartible. They said : " Taking it, in accordance with the arguments of the appellant's counsel, that impartibility was the rule then applicable to the estate, their Lordships are clearly of opinion that the subsequent dealings with the estate, the nature and terms of the grant under which it has been held throughout the present century, the absence of proof of any usage or practice of impartibility in the succession to the estate, contrary to the ordinary Hindu law of succession, and the character of the estate which is in no way distinguishable from an ordinary zemindari subject to the payment of a fixed amount of revenue, all clearly lead to the conclusion that the zemindari is now a partible estate in a question of succession."

**Morangi
case.**

In this connection I have to place before you some of the provisions of the Bengal Regulations. The preamble to Regulation XI of 1793 says : " A custom, originating in considerations of financial convenience, was established in these provinces under the native administrations, according to which some of the most extensive zemindaries were not liable to division. Upon the death of the proprietor of one of these estates, it devolves entire to the eldest son or next heir of the deceased to the exclusion of all other sons or relations. This custom is repugnant both to the Hindu and Mahomedan laws, which annex to primogeniture no exclusive right of succession to landed property, and consequently subversive of the rights of those individuals who would be entitled to a share of the estates in question, were the established laws of inheritance allowed to operate with regard

**Bengal
Regulation
XI of 1793.**

to them as well as all other estates. It likewise tends to prevent the general improvement of the country from the proprietors of these large estates not having the means, or being unable to bestow the attention requisite for bringing into cultivation the extensive tracts of waste land comprised in them. For the above reasons, and as the limitation of the public demand upon the estates of individuals as they now exist, and the rules prescribed for apportioning the amount of it on the several shares of any estates which may be divided, obviate the objections and inconveniences that might have arisen from such divisions when the public demand was liable to annual or frequent variation, the Governor-General in Council has enacted the following rules." Then the rules are given, declaring that landed property, in cases of intestacy, is to descend according to the Mahomedan and Hindu law of inheritance, and providing for division of estates. But in course of the following 7 years it was found, that there existed landed estates in the Jungle Mahals of Midnapore and other Districts, where the custom of holding estates entire had prevailed for a long time, and accordingly Regulation X of 1800 was passed to counteract the effect of Regulation XI of 1793. The Regulation consists of the two following sections.

Reg. X of
1810.

I. By Reg. XI of 1793 the estates of proprietors of land dying intestate are declared liable to be divided among the heirs of the deceased agreeably to the Hindu or Mahomedan laws. A custom, however, having been found to prevail in the Jungle Mahals of Midnapore and other districts, by which the succession to landed estates invariably devolves to a single heir without the division of the property, and this custom having been long established and being founded on certain circum-

stances of local convenience which still exist—the Governor-General in Council has enacted the following rule to be in force in the provinces of Bengal, Behar and Orissa from the date of its promulgation.

II. Regulation XI. 1793 shall not be considered to supersede or affect any established usage which may have obtained in the Jungle Mahals of Midnapore and other districts, by which the succession to landed estates the proprietor of which may die intestate, has hitherto been considered to devolve to a single heir to the exclusion of the other heirs of the deceased. In the *mahals* in question the local custom of the country shall be continued in full force as heretofore and the Courts of Justice be guided by it in the decision of all claims which may come before them to the inheritance of landed property situated in those *mahals*.

The effect of the two Regulations was considered by the Privy Council in *Raja Deedar Hossein v. Rani Zuhooroonissa*, 2 M.I.A. 441. Their Lordships observed :—"It was contended on the part of the appellant, that the Regulation of 1793 was repealed with respect to this Zemindari by another Regulation (meaning X of 1800). But it is clear to their Lordships that this latter Regulation did not apply to undivided Zemindaries in which a custom might prevail that the inheritance should be indivisible, but only to the Jungle Mahals and other entire districts where local custom prevails. The construction contended for *viz.*, that every individual Zemindari in which the custom had been that it should descend entire was exempted, would repeal the Regulation of 1793 altogether, whereas it is clear that it was intended to be partially repealed only." This case seems to decide that in the provinces of Bengal, Behar,

Effect of the
Regulations.

and Orissa *local custom* prevailing in an *entire district* may, though family usage cannot, make a zemindari impartible and descensible to a single heir in cases to which Regulation XI of 1793 is applicable. You will note that this Regulation deals with zemindaries and not with principalities.

Principalities or Raj.

As to a Raj or principality, their Lordships of the Privy Council in *Gunesh Dutt Singh v. Maharajah Moheshur Singh* (1855) 6 M. I. A. 164 said: "We apprehend that the principle upon which we are about to proceed in this case admits of no doubt or question whatever. By the general law prevailing in this district, and indeed generally under the Hindu law, estates are divisible among the sons, when there are more than one son; they do not descend to the eldest son, but are divisible amongst all. With respect to a Raj, as a Principality, the general rule is otherwise and must be so. It is a Sovereignty or Principality—a Subordinate Sovereignty and Principality no doubt, but still a limited Sovereignty and Principality, which, in its very nature, excludes the idea of division in the sense in which that term is used in the present case. Again, there is no doubt that the general law with respect to inheritance, as well as with respect to other matters, may, in the case of great families, where it is shown that usage has prevailed for a long series of years be controlled, unless there be positive law to the contrary. Now, it is said in this case that there is no positive law which excludes the divisibility, unless it be clearly proved to be an ancient Raj which it is denied that it is."

Maintenance allowances.

We have seen that in some of the impartible zemindaries, allowances are made in lands for the maintenance of the younger members of the family. In the above case of *Gunesh Dutt Singh*, referring to these allowances made in the particular Principality or Raj, their Lordships observed:

“Where an estate is granted to a younger son as a Babu allowance, he continues to pay the rent and assessment to the Raja; the property is never separated from the zamindari at all. The cases, therefore, of absolute grants and of grants by way of Babu allowance are essentially different in their nature.”

In Bombay, *saranjams* are grants of the Government share of the revenue due in respect of any estate. They have been held to be impartible. *Ram Chandra Mantri v. Venkat Rao* (1882) I. L. R. 6 Bom. 598. But where it appears that the members of a family have treated *saranjams* as partible over a long period of years and have dealt with them as such, in effecting partitions of the entire family property which consisted both of the incomes and *saranjams*, it was held that the Court was justified in concluding that the *saranjams* were originally partible or had become so by family usage. *Madhav Rao Manohar v. Atmaram Keshav* (1890) I. L. R. 15 Bom. 519.

**Saranjams
in Bombay.**

LECTURE IX.

Law of Partition under Mitakshara.

In the earliest times immovable property was indivisible and partition unknown—Partition under the Mitakshara—Partition is origin of property—Meaning of above—Important consequences attached to partition under Mitakshara—Evidence of partition—What amounts to legal partition—Appoozier's case—Decision construed by Justice Markby—Share not known before partition—Cases—Summary—Partial partition as to members—Onus of proof when partial separation is admitted—Partial partition as to property—Effect on other properties after partial partition—Partition under Mitakshara—Four heads—(1) What is the property to be divided—(2) Who can demand partition—(3) Four periods of partition—The periods, refer to self-acquired property of father—Son can demand partition of ancestral property at any moment—Son cannot demand partition of property inherited by father collaterally—(4) Who are entitled to share—Partition of obstructed heritage—Partition among father and his descendants—Who are incompetent to share—Their sons free from defects—their adopted sons—Sons of a disqualified heir born after partition—Krishna v. Sami—Who are the persons entitled to share—Sons—Grandsons—Adopted sons and adopted sons of sons—Mothers—their portions—unmarried sisters—Grandmother—afterborn son—Sons of different tribes—adopted son—Kritrima son—Dattaka son—Shares of a natural and adopted son in competition—adopted son and adopted son of natural son—effects discovered after partition—partition after father's death—When partition is re-opened—at instance of absent member—at instance of afterborn son—upon removal of disqualification—afterborn son of a disqualified coparcener—Minors—Effect of partition—Why sons do not more frequently seek partition during father's lifetime—Reunion—only among certain relations—Brothers of whole and half blood.—Incomplete partition—Onus to shew reunion.

In earliest times immovable property was indivisible and partition unknown.

Professor Julius Jolly in his Lectures in 1883 dwelt at length on the law of partition according to the Hindu *shastras*. He has shewn that in the earliest times partition was unknown, that immovable property was then looked upon as indivisible and that, as time advanced, partition by the will

of the father became prevalent. Touching the question of such partition by the will of the father, he says :—"The distribution of the family-property by the father appears to be a very ancient practice in India, as it is recorded in the Veda. It was a natural exercise of the *patria potestas*, and is found almost wherever the right to make a will is wanting, which is so characteristic an attribute of the power of a *pater familias* under Roman Law." The Professor has traced the gradual development of the present law of partition from its earliest stages as evolved in the Smritis and commentaries. I shall not tread over the same grounds, but shall refer to his lectures whenever necessary. I shall consider at length the case-law on the subject, and place before you the practical, rather than the theoretical, view of the questions that arise in this connection.

The author of the *Mitakshara* in chap. I sec. I para. 4 defines partition as "the adjustment of divers rights regarding the whole, by distributing them in particular portions of the aggregate." In para. 7, he proposes to himself the question, "whether property arise from partition or the division be of an existent right," and in para. 18 answers the question thus : "Of these positions, that of property arising from partition is right." Indeed the author in para. 8 quotes with approbation the text of Gautama, *viz.*, "An owner is by inheritance, purchase, partition, seizure, or finding"; thus enumerating *partition* as one of the sources of property. It does not follow from this that property in a thing or land belonging to several individuals does not, before partition, vest in any body. On the contrary, the whole body of proprietors, as a single person, own the thing or land; or, in other words, the property in the thing or land resides in the whole body of proprietors con-

Partition
under the
Mitakshara.

Partition is
origin of
property.

Meaning of
above.

sidered as one person. Nor is it meant to be asserted that before partition none of the body of proprietors have any interest in the thing or land. But what is meant to be predicated is that, before partition, the interest of single members composing the whole body of proprietors is inchoate, and that partition perfects or matures this interest.

Important
consequences
attached
to partition
under
Mitakshara.

Now, under the Mitakshara, a separation has important consequences attached to it. Thus, Narada (13, 25-26) speaking of brothers living joint in food, worship and estate, says :—" Among brothers, if any one die without issue, or enter a religious order, let the rest of the brethren divide his wealth." We have also seen* that survivorship obtains among the coparceners while the family is joint. But, if a brother dies in a state of separation, his widow would be entitled to his estate in preference to his divided brothers. Thus Vijnaneswara in Mit. ch. II sec. II para. 39 says :—" Therefore it is a settled rule, that a wedded wife being chaste, takes the whole estate of a man, who, being separated from his co-heirs and not subsequently re-united with them, dies leaving no male issue."

Evidence of
partition.

We have seen before, that a partition has also very important results attached to it, as regards the right of enjoyment and disposal of the several shares by the separated owners. Oftentimes, therefore, a court of justice has to find as a question of fact, whether there has been a legal partition. The author of the Mitakshara in ch. II sec. XII deals with the question in this way :—

1. " Having thus explained partition of heritage the author next propounds the evidence by which it may be proved in a case of doubt. " 149.

When partition is denied, the fact of it may be ascertained by the evidence of kinsmen, relatives, and witnesses, and by written proof, or by separate possession of house or field." In the next three paragraphs the commentator dilates on the above text.

But this is a question of evidence, and the legislature has not vouchsafed to the people of India their personal law of evidence. The question must be decided in accordance with the rules of the Indian Evidence Act I of 1872, though, of course, what amounts to a legal partition must be determined under the personal law of the people.

Now, in determining what amounts to a legal partition, the provisions of Chap. II sec. XII of the Mitakshara throw considerable light. Thus, the separate possession of a house or field indicates partition by metes and bounds, and if nothing short of such separate possession had been required to be established in order to prove a legal partition, one might have inferred that there could be no partition except by metes and bounds. But Yajñavalkya mentions also written proof, (as agreements to hold in severalty), and evidence of kinsmen, and the commentator quotes in support Narada 13, 36-37 and says in para. 3: "The practice of agriculture or other business pursued apart from the rest, and the observance of the five great sacraments and other religious duties performed separately from them, are pronounced by Narada to be tokens of a partition." The text of Narada referred to above has been thus translated: "If a question arise among co-heirs in regard to the fact of partition, it must be ascertained by the evidence of kinsmen, by the record of the distribution, or by separate transaction of affairs. The religious duty of unseparated brethren is single. When partition indeed has been made, religious

What amounts to legal partition.

duties become separate for each of them." In this connection should be read the observations made in the Vyavahara Mayukha at the beginning of the chapter on Partition, *viz.*, "Even where there is a total absence of all property, a partition is effected by the mere declaration, 'I am, separate from thee'; for, partition is but a particular condition of the mind; and this declaration is an indication of the same."

Confining ourselves, therefore, to the texts and commentaries, we see that a partition, when disputed, may be proved by showing separate possession of a house or field, or by agreement as to separate enjoyment, or by proving that there was a distribution of the whole property among the sharers, or by establishing a separation in the status of the family, or by showing the intention to separate. Now a distribution among the sharers may be by the assignment of separate shares in the same entire property, as well as by assigning distinct portions of such property.

Appoovier's
case.

In *Appoovier v. Ramasubba Ayyan* (1866) 11 M. I. A. 75; 8 W. R., P. C., 1, it was held in 1866 that an actual partition by metes and bounds was not necessary to render a division of undivided property complete, but when the members of an undivided family agreed among themselves, with regard to a particular property, that it should thenceforth be the subject of ownership in certain defined shares, then the character of undivided property and joint enjoyment was taken away from the subject matter so agreed to be dealt with. Lord Westbury in delivering the judgment of the Judicial Committee said:—"According to the true notion of an undivided family in Hindu law, no individual member of that family, etc."* In the

* Ante p. 18.

case before Lord Westbury, there was a written document whereby an actual division by metes and bounds of certain villages was effected, and as to others it provided for enjoyment in distinct shares, but deferred the division by metes and bounds to a future date. Lord Westbury after stating the above facts proceeded—"Nothing can express more definitely a conversion of the tenancy, and with that conversion a change of the *status* of the family *quoad* this property. The produce is no longer to be brought in the common chest as representing the income of an undivided property, but the proceeds are to be enjoyed in six distinct equal shares by the members of the family who are thenceforth to become entitled to those defined shares. Thus—using the language of the English law merely by way of illustration,—the joint tenancy is severed and converted into a tenancy in common."

Mr. Justice Markby in *Bikramajeet Lall v. Mussamat Phoolbas Kooer* (1870) 14 W. R. 340, held (see p. 345) that a mere signification of intention was sufficient to constitute a separation without an actual partition by metes and bounds. An application for review having been made (see 18 W. R. 48) the learned Judge construed Lord Westbury's judgment in *Appoovier's* case as indicating that even before partition, the shares of the parceners were defined. He says:—"It is clear to me that what Lord Westbury had under consideration was not so much the separate ownership of a share in the *corpus*, as separate enjoyment of the profits of it." And again "If I might venture to put my own construction on *Appoovier's* case, I should say that the main features of the change which takes place in a *Mitakshara* family upon partition of ownership without partition by metes and bounds were

Construed
by Justice
Markby.

these :—that both before and after such a partition, each member of the family is the owner of a share to be ascertained at any given moment by the same rules as those which govern partition; that both before and after a partition of ownership without a partition by metes and bounds, the rights of possession of the members of the family over the *corpus* are the same; that after such a partition the right of enjoyment is modified in this that each member can, after such a partition, claim to have a separate share in the profits set apart to his own use, and can claim nothing out of the other profits." It would seem that the construction put by Justice Markby would have the effect of making out that partition is of pre-existing property, and not that partition is the origin of property, as acquisition or seizure is, and further, that separate enjoyment is of the essence of a partition.

Share not known before partition.

What really amounts to partition under the Mitakshara is a question of some nicety. But nothing is more clear than this, that before partition the extent of the shares of the several members is in the eye of the law not known. I have advisedly used the expression "in the eye of the law." For, what determines the extent of these shares is the constitution of the family, and when that is known, the extent of the shares of the individual members is also known. And, as a matter of fact, every one of the members of a family has the ready means of knowing what fraction of the whole he would be entitled to at partition, if then effected. But until a formal partition determines this fraction, it is not known for any purpose. Thus, even in Madras and Bombay where private alienations of the shares of individual members before partition are good and operative, the share purchased can only be determined at a partition. In fact, what the

purchaser purchases is the interest of the vendor as it would be ascertained at a partition.

Let us now consider some of the decided cases **Cases.** to see how they help us in determining what amounts to a legal partition.

The earliest case that I have traced out in the Reports is a Dayabhaga case—that of *Prawn Kissen Mitter v. Sreemutty Ram Sunderee Dossee*, *Fulton's Reports* p. 110, decided in October 1842 by Chief Justice Peel and Justices Grant and Seton. In that case the father of the plaintiff Prawn Kissen Mitter having died leaving the plaintiff and another son and a widow, a bill for partition was filed, and it was decreed that the widow and her sons were each entitled to a third part of the ancestral property. But the partition was in fact never made, and the family notwithstanding the decree continued to live joint. While so living, Prawn Kissen's brother died, leaving a son who succeeded to his third share, and upon the death of this son, the defendant Ram Sunderee as his childless widow succeeded to her husband's third share. Upon the death then of Prawn Kissen's mother, Prawn Kissen instituted the present suit against Ram Sunderee for possession of the entire third share of his mother. The learned Judges said: "No partition having, in fact, been made, the decree directing a partition had not altered the nature of the property and it must be looked upon as undivided in its nature. We are inclined to think that the heirship must stand as at the time of the grandfather's death and that the son and grandson's widow in this case are equally entitled." It might at first sight seem that the effect of the judgment was to lay down that an unexecuted decree for partition would not be sufficient to effect a legal division. But this case lays down no such law. In the first

place, it was a Bengal case in which the word "partition" has a very different signification from what it has in the Mitakshara. In the second place, the family continued joint, notwithstanding the decree for partition, and for aught that is known to the contrary, they might have given up the idea of separation after the passing of the decree. In the third place, their living joint after the decree might be looked upon as effecting a re-union, in which case the same results would follow. And in the last place, would the decree in *Prawn Kissen's* suit for his mother's third part have been different, if his mother during her lifetime had partitioned off her third share? No. The share allotted to the mother was for her maintenance only, and was taken, from out of the sons' portions to which it reverted equally upon her death. See *Sorolah Dossee v. Bhoobun Mohun Neoghy* (1888) 1. L. R. 15 Cal. 292.

In *Bulakee Lal v. Mussamat Indurputty Kowar*, 3 W. R. 41, the High Court of Calcutta held that any act or declaration showing unequivocally an intention on the part of any shareholder to hold his own share separately, and to renounce all rights upon the shares of the others constituted a complete partition.

In *Badamoo Koowar v. Wuzeer Sing* 5 W. R. 78, it was held that a definitive separation in estate, indicated by separate enjoyment and distinct liabilities, constituted a legal separation.

In *Josoda Koonwar v. Gourie Byjonath Sahae Singh* (1866) 6 W. R. 139, it was held that partition could be effected otherwise than by actual division into parcels.

In *Sheodyal Tewaree v. Judoo Nath Tewaree*, 9 W. R. 61, decided by Justices Loch and D. N. Mitter in 1868, it was laid down in very general

terms "that under the Hindu law two things at least were necessary to constitute partition: the shares must be defined and there must be distinct and independent enjoyment of these shares." But these general words must be understood with reference to the particular facts of the case which the learned Judges had to decide. This case was considered by Justice Wilson in *Tej Protap Singh v. Champa Kalee Koer* (1885) 1. L. R. 12 Cal. 96, where that learned Judge observed: "The judgment was delivered by Dwarkanath Mitter, J., and we see no inconsistency between that case and the view we take in the present case. The subject dealt with in that judgment was the interest which a mother or grandmother takes under a partition between her sons or grandsons. In such a case the mother or grandmother has no vested title so long as her sons or grandsons are joint. She acquires her title only by virtue of partition. And, as we understand that judgment, it decides no more than this that in order to complete the title of the mother or grandmother which she acquires by partition, the partition must be completed, that there must be not only a decree for partition, or an agreement for partition, but a decree or an agreement carried into effect." And again, "Now, these authorities seem to us to establish this, that an agreement for separation and partition, or a decree for separation and partition, if according to its terms it purports to be an agreement or a decree for present separation, and present division in interest and right, operates to make the parties from that time separate, although the actual partition by metes and bounds and separate possession and enjoyment be postponed until the agreement or the decree is fully carried into effect."

In *Debee Pershad v. Phool Koeree alias Ghena*

Koeree (1869) 12 W. R. 510, it was held that though actual partition by metes and bounds was not necessary to a separation between the members of a joint Hindu family, yet there must be some unequivocal act or declaration, on the part of the family, of their intention to separate, and that a suit by one member for a declaration of his right was not a sufficient indication of such intention. This case was considered by their Lordships of the Privy Council in *Joynarain Giri v. Girish Chunder Myti* (1878) 1. L. R. 4 Cal. 434 or L. R. 5 I. A. 228, which has been hereafter considered.

In *Raja Suraneni Venkata Gopala Nara Simha v. Raja Suraneni Lakshmi Venkama Roy* (1869) 3 B. L. R., P. C. 41, their Lordships held that according to the *Mitakshara*, an agreement for a partition, although not carried out by actual partition of the property, was sufficient to constitute a division of the family, so as to entitle the widow of a deceased brother to succeed to his share of the ancestral property in preference to the surviving brothers. The Judicial Committee observed: "Their Lordships are further of opinion, that they must presume, that although there was no division of the *zemindari* or of the lands, by metes and boundaries, yet that the arrangement proceeded upon the footing of the deed, that the rents were divided according to the stipulations of the deed, and that if the contrary took place, it lay upon the plaintiff to shew that such was the case."

In *re Phuljhari Koer* (1872) 8 B. L. R. 385, *Loch and Ainslie, JJ.*, held that where by a deed of *Sharakatnama*, the members of a Hindu family declared that each of the members was entitled to a definite fractional share of the whole estate, such deed was not sufficient to constitute

a valid partition. Justice Ainslie, in delivering the judgment of the Court, said :—" I altogether fail to see that the decisions, either of the Privy Council or of this Court, warrant us in saying that a mere definition of an interest in a joint estate, in terms of a fraction of the whole without any indication of an intention to divide interest and liabilities, is sufficient to constitute a legal dissolution of a joint family."

In *Doorga Persad v. Mussamat Kundun Koowar* (1873) 13 B. L. R. 235; L. R. 1, I. A. 55; 21 W. R. 214, the Privy Council held on the authority of *Appoovier's* case that an *Ekrarnama*, which did not recite a previous status of indivision, and did not in terms declare that the parties thereto should thenceforth be an undivided family nevertheless meant that the parties would thenceforth hold and enjoy the property in severalty. They further held that in cases of division of joint property, not carried out by a partition by metes and bounds, the question whether the *status* of the family had been thereby altered was a question of intention of the parties to be inferred from the instruments which they had executed and the acts which they had done to effect such division.

In *Joynarain Giri v. Girish Chunder Mytee* (1878) I. L. R. 4 Cal. 434; L. R. 5 I. A. 228, the facts were shortly these :—

Joynarain and Shib Prosad were two cousins descended from the same grandfather. Shib Prosad having been expelled from the family, brought a suit against Joynarain and obtained a decree, in the Zilla Court as well as in the High Court, for possession of a moiety of the properties in the possession of Joynarain, with mesne profits. An appeal was preferred by Joynarain to the Privy Council, but, pending the appeal, Shib Prosad died and Joynarain applied to bring the name

of his widow on the record; but the Courts in India gave effect to a will which had been executed by Shib Prosad, and substituted the respondent Girish Chunder Mytee in place of Shib Prosad. The Privy Council having affirmed the decree of the Courts in India, Girish Chunder applied to execute the decree in favour of Shib Prosad. Joynarain thereupon instituted the present suit for setting aside the will of Shib Prosad on the allegation, that he and Shib Prosad were joint owners under the Mitakshara, and that though Shib Prosad had obtained a decree, no execution of the decree having been effected during his lifetime, Shib Prosad died in a state of jointness, so that he had no authority to will away his undivided share, while by the principles of survivorship Joynarain was entitled to the whole undivided estate.

Their Lordships held that a separation had taken place during the lifetime of Shib Prosad and that the will was, therefore, valid and operative. They said :—" Their Lordships regard the conduct of Shib Prosad Giri, when he left the house in which both he and Joynarain Giri lived, and withdrew himself from the commensality with his cousin, as indicating a fixed determination henceforward to live separately from his cousin, and they treat the fact of his borrowing money for his separate maintenance, as well as his making a will, as indicating, at all events, that he himself considered that a separation had taken place. His plaint indicates that he accepts what he terms the expulsion of his cousin from the joint family, and claims the share to which he would be entitled after that expulsion, and after a separation. But further, it appears to their Lordships that the decree which has been read is in effect to give to Shib Prosad Giri a separate share of

the property of the grandfather. It gives him, in terms, possession of the eight annas which he claimed of the real estate; it gives him mesne profits from the day of the separation, *i.e.*, from the time when he left the house in which he had been living with his cousin, and it gives him also a half of the personal property. That being so, their Lordships are of opinion that although the suit is not actually in terms of partition, yet that the decree does effect a partition, at all events, of rights which is effectual to destroy the joint estate under the doctrine laid down in the case which has been quoted of *Appoovier v. Rama Subba Aiyar*."

In *Ambika Dat v. Sukh Mani Kuar* (1877) I. L. R. 1 All. 437, it appears that there was a quarrel between the two sharers, Maneshar Ram and Dhaneshar Ram, in 1854, and that they then defined their shares in the property which they held and which at their deaths came to be recorded in the same way in their sons' names. The Allahabad Court ruled that there had been no separation under the above circumstances. Justice Turner said :—" If we find through a long course of years nothing to show that the definement of shares which took place in 1854 has been acted on, and that the parties continued to enjoy the property on the same footing as before, it is but reasonable to suppose that, although they may have taken some steps towards separation, from some cause or other, it may be a reconciliation, the intention to separate was abandoned." This case was commented on by Justice Wilson in I. L. R. 12 Cal. p. 96.

In *Raghubanund Doss v. Sadhu Churn Doss* (1878) I. L. R. 4 Cal. 425, Justice Markby* said : "No right vests in any member of the family to a specific share until some act has been done

which has the effect of turning the joint ownership into several ownership. This may be done by a mere signification of intention, and when a signification of intention has once taken place which has this effect, the share of each member becomes at the same moment both several and defined."

In *Hoolash Kooer v. Kassee Proshad* (1881) I. L. R. 7 Cal. 369, Mitter and Maclean, JJ., held that the registration of the names of the four brothers, who constituted the joint family, with the specification of their respective shares under the Land Registration Act VII (B. C.) of 1876, not accompanied by an intention to deal with a particular share separately, would not constitute a separation of the joint family.

In *Sakharam Mahadev Dange v. Hari Krishna Dange* (1881) I. L. R. 6 Bom. 113, Chief Justice Westropp held that a decree for partition does not effect a severance as among the parties to the suit so long as it remains under appeal, and that, if, pending the appeal, one of the parties to the suit, who has been declared entitled to a specific portion, dies, there is nothing to prevent the other coparceners from being entitled to such portion by the principles of survivorship. The general principle here enunciated is not opposed to the principle laid down in *Joynarain Giri v. Girish Chunder Myti* already considered. There also, Shib Persad died while yet the decree for partition was under appeal to the Privy Council. But *Joynarain*, instead of applying for abatement of the suit by reason of Shib Persad's death, sought to bring upon the records his widow's name, as if the property had been divided.

In *Babaji Parshram v. Kashi Bai* (1879) I. L. R. 4 Bom. 157, the Bombay Court held that where there was no indication of an intention to

presently appropriate and enjoy in a manner inconsistent with the ordinary state of enjoyment of an undivided family, an agreement to merely divide was not of itself sufficient to effect a partition. The Judges said—"we feel nothing to support the conclusion that the decree operated to change the character of the property. The direction 'that the estate be divided' was, at best, but an inchoate partition which remained to become legal by an appropriation in execution of the respective shares." It should be noted that the Privy Council cases of Doorga Persad and Joynarain Giri were not cited in argument or referred to in the judgment.

In *Chidambaram Chettiar v. Gauri Nachiar* (1879) 1. L. R. 2 Mad. 83, the younger of two brothers sued his brother and some other defendants for recovery of a moiety of the family-property after setting aside certain encumbrances created by the elder brother in favour of the other defendants. The Court, after holding that the property was partible and the younger brother was entitled to a moiety, was enquiring into the validity of the encumbrances, when the younger brother died without sons. The question, thereupon, arose as to whether the younger brother died in a state of separation so that his widow might inherit his share. The Privy Council held that the younger brother died in a state of separation. They said: "Their Lordships are of opinion that the judgment must be taken to be equivalent to a declaratory decree determining that there was to be a partition of the estate into moieties and making the brothers separate in estate from that date if they had not previously become so."

In *Ram Lal v. Debi Dat* (1888) 1. L. R. 10 All. 490, it was held that from evidence of definition of shares followed by entries of separate

interests in the revenue records, if there be nothing to explain away this circumstance, separation as to estate might be inferred.

In *Ananta Balacharya v. Damodhar Makund* (1888) I. L. R. 13 Bom. 25, it was held that an agreement to divide was sufficient to constitute partition.

In *Madho Parshad v. Mehrban Singh* (1890) I. L. R. 18 Cal. 157, their Lordships of the Privy Council said: "Any one of several members of a joint family is entitled to require partition of ancestral property, and his demand to that effect, if it be not complied with, can be enforced by legal process....Actual partition is not in all cases essential. An agreement by the members of an undivided family to hold the joint property individually in definite shares, or the attachment of a member's undivided share in execution of a decree at the instance of his creditor, will be regarded as sufficient" to constitute a separation in the family and a partition of the property.

In *Budhamal v. Bhagwan Das* (1890) I. L. R. 18 Cal. 302, the Judicial Committee of the Privy Council held that where a distribution of ancestral estate among the members of a family had taken place in former years and been followed by continuous possession without their having any intention to re-adjust or to hold on behalf of the family, the partition was complete.

Summary.

From all the above decisions, the following inferences seem legitimately to arise:—

(1) In those cases where a coparcener can at any moment demand a partition, a coparcener has merely to signify to the other coparceners his present intention to separate, and from the time when such intention is made known to the other sharers, the coparcener may be considered separate from the others both in family and property.

A long time may elapse before any separation into distinct portions can be actually effected, or even before the extent of such coparcener's share in the *corpus* can be determined, but the joint interest of the separating coparcener ceases and his individual interest begins from when he makes the demand. We have seen that the extent of the shares depends upon the state of the family, and that though by births and deaths in the family the shares decrease and increase, and theoretically, therefore, no member of a joint family before partition has any definite share, practically every member of the family at any given moment of time has the ready means of knowing what fraction of the whole his share represents.

(2) In cases of written agreements effecting separation, either by metes and bounds or by defining shares in the corpus, the separations take effect from the dates of such agreements. But agreements, which merely define the shares and do not disclose a present intention to follow up the definement by separate possession of such shares, have not this effect.

Agreements
effecting
separation.

(3) Decrees for partition, executed or unexecuted, effect separation among the coparceners in respect of the property divided or sought to be divided, *i.e.*, the *status* of the coparceners would be one of separation in respect of the property.

(4) Declaratory decrees which merely define the shares of the parceners also effect a legal partition. But the effect of such decrees may be counteracted by subsequent joint possession for a long time.

Momentary separation may be followed by re-union; but you will do well to keep the *status* of separation distinct from the *status* of re-union. You will thereby steer clear of the difficult questions of the onus of proof that otherwise may beset you.

(5) Evidence of separate enjoyment is conclusive on the question of separation, and in cases where the person, whose separation or jointness is in issue, is not a coparcener who can demand a partition, such separate enjoyment is the only test. But even, without such evidence, separate enjoyment is to be presumed among coparceners as following an agreement or a decree to divide. In every case an intention to follow up the agreement or the decree at no distant future is to be presumed, and it will be for the party asserting jointness to shew that such intention was given up or abandoned.

Partial partition as to members.

Partition under the Mitakshara may be by some members, only—the others remaining joint. The Mitakshara is altogether silent on this point. Mayne quotes Ch. I sec. II para. 2, as authority for holding that there may be partial* separation as regards the members.

It is true that at a general partition not only is the family-property divided but also the liabilities, and that among the liabilities are included the debts of the family and the charges for the maintenance of some of the members of the family, and that in order that the separate rights and liabilities of the separating member may be correctly determined, the rights and liabilities of the others *inter se* should also be examined. But a mere ascertainment of the separate rights and liabilities of the members cannot, in opposition to the express wishes of the members, operate as a division. This point, moreover, seems to have been settled by the authority of judicial decisions.

In *Mussamat Chutha v. Miheen Lal* 11 M. I. A. 369, their Lordships of the Privy Council said :

* The text is "when a father wishes to make a partition he may at his pleasure separate his children from himself, whether one, two or more sons."

“The family originally consisted of three brothers, Shama Dass, Damodar Das and Koonj Kishore Dass. It is admitted on all hands that Shama Dass separated himself from his brothers and took his share of the ancestral estate as separate property. It is, however, clear upon the evidence (and if the fact be not admitted, it is hardly disputed on the part of the appellant) that the two other brothers continued joint after the separation of Shama Dass, and further, that for many purposes Damodar Dass and the respondent (being his nephew, the son of Koonj Kishore Dass) were members of a joint family at the time of Damodar Dass's death.”

In *Deendyal Lal v. Jugdeep Narain Singh* (1877) I. L. R. 3 Cal. 198, to which we referred at length in the earlier Lectures, their Lordships of the Privy Council, after observing that in a partnership concern though one partner could not by private alienation of his interest introduce a stranger into the firm, a creditor of one of the partners could do the same thing by execution sale, proceed in this way : “It seems to their Lordships that the same principle may and ought to be applied to shares in a joint and undivided Hindu estate ; and that it may be so applied without unduly interfering with the peculiar *status* and rights of the coparceners in such an estate, if the right of the purchaser at the execution sale be limited to that of compelling the partition, which his debtor might have compelled, had he been so minded before the alienation of his share took place.”

In *Radha Churn Dass v. Kripa Sindhu Dass* (1879) I. L. R. 5 Cal. 474, a contention was raised as to whether when a separation, as regards some members, was admitted, the separation of the others *inter se* was not also to be presumed. But no decision was passed on the question as to

whether a separation as regards some members only was allowable under the law.

In *Upendra Narain Myti v. Gopee Nath Bera* (1883) I. L. R. 9 Cal. 817, the Judges held that the separation of one member of a Hindu family does not in itself affect the position of the other members *inter se*.

We have been here considering whether, under the Mitakshara, a separation of some members is not practicable, and not whether generally, or under the general law, there is any objection to such separation.

We find as an ordinary event that at a general partition of family-property, some of the members live joint in estate among themselves, though separate from the others, and there is nothing in the law to prevent such partial separation. Professor Jolly on p. 135 says:—"Partial partition as regards the owners must have become common as soon as each coparcener obtained the right to demand a partition."*

**Onus of
proof when
partial
separation
is admitted.**

In this connection, I ought to state that a question frequently arises as to whether when the separation of some of the members has been proved, the Court ought not to infer that the others also separated *inter se*. The authorities on this point seem to be conflicting: see *Radha Churn Dass v. Kripa Sindhu Dass* (1879) I. L. R. 5 Cal. 474; and *Upendra Narain Myti v. Gopee Nath Bera* (1883) I. L. R. 9 Cal. 817.

It seems that the presumption that a joint family continues to be joint is to be acted upon until the case of any particular members having actually separated is established, and that then such members only should be held to have separated, as to whose separation the evidence may be conclusive.

Let us next consider whether, under the Mitakshara law a partition can be made of a portion only of the entire family-property. Partial partition as to property.

There is no text in the Mitakshara directly bearing on this point. But in Ch. II sec. 10 the author in excluding the impotent, the outcast &c. from participation declares them entitled to maintenance from those who take their inheritance (see Vishnu XV, 33). It is clear that this text applies only when a partition is effected among the coparceners; for, so long as the family remains joint, all the members including the impotent, the lame, &c., must be maintained.

At a general partition, a portion of the joint property is generally set apart for the discharge of these liabilities, and the rest is divided among the coparceners. The portion so assigned is not the allotment of the persons entitled to maintenance, nor is it divided among them, if they are more in number than one. The charges for maintenance are jointly met from out of the income of the properties thus set apart. And then when by death or other causes, the liability for maintenance ceases, the properties left joint are divided among the original co-owners or their heirs.

From this practice which is recognized in the texts, one can infer that the author contemplated partition of a portion of the property of a joint family. But there are various considerations which would influence a modern court of justice to allow or not a partition of a portion of the family-properties. Thus, when the co-sharers are in possession of different portions, it would not be equitable at the instance of one of them to effect a division of such portion only as is not in his occupation. But there can be no objection if all the co-sharers wish for a partition of a portion only of the joint property to suit their conveni-

ence. In fact, the case of a portion of the family-property being left joint at a general partition, in order to meet the common liabilities of the coparceners, also resolves itself into one of partition by consent or arrangement. And, accordingly, Sir Richard Garth in *Radha Churn Dass v. Kripa Sindhu Dass* (1879) I. L. R. 5 Cal. p. 474 observes:—"It seems indeed very doubtful whether by the Hindu law any *partial partition* of the family-property can take place except by arrangement." See observations of Justice Muthusami Ayyar in *Manjanatha Shanabhaga v. Narayana Shanabhaga* (1882) I. L. R. 5 Mad. 362. See also *Koer Hasmat Rai v. Sunder Das* (1885) I. L. R. 11 Cal. 396; and *Venkatarama v. Meera Labai* (1889) I. L. R. 13 Mad. 275. Professor Jolly in his Lectures on p. 135 says:—"Partial division as regards the property is not expressly referred to either in the Smritis or in the Digests. That it was an old and common practice may be inferred from the rules about individual property." I have here considered the question as one of Hindu law. I shall refer to it again in a subsequent Lecture.

Effect on
other prop-
erties of a
partial
partition.

Let us next discuss the effect of a partial partition of family-property on properties left joint at such partition, *i.e.*, whether such property intentionally left joint by the coparceners would descend as separate property or the principles of survivorship would apply.

We have seen that a mere declaration by one of several coparceners of an intention to separate has the effect of making a separation in the *status* of the family and of effecting a partition of the joint property. But we are now supposing the case of properties having been left joint by the parties themselves. As to these, the law of succession applicable to joint property should

apply. It is, we know, the nature of the property and not the *status* of the owner that determines the law of succession to it. Thus property inherited by a man as ancestral property under the Mitakshara is the unobstructed heritage of his sons and grandsons. To such property the principles of survivorship apply, and if the owner were to die childless in a state of union with a brother, the brother would exclude the widow. But if the property were the self-acquired property of the man and he died childless in a state of union with his brother, the widow would inherit the property. Now the same man may be possessed of both classes of property—ancestral and self-acquired. And the rules of succession would be different in the one case from those in the other. Applying these principles to the case under our consideration, the coparcener would be possessed of both separate and joint properties and different rules of succession would apply to the different kinds of property.

See 3 Agra 37 ; also Gavrishankar Parabhuram v. Atmaram Rajaram (1893) I. L. R. 18 Bom. 611.

Let us now consider generally the Mitakshara law of partition. This branch of the subject may be conveniently divided into four heads: (1) the property to be divided, (2) the persons who can demand a partition, (3) the periods of partition, and (4) the persons who are entitled to share at partition.

Partition
under
Mitakshara.

(1) We have already seen what is coparcenary property and what is not. We have seen that in a joint family, some of the members may own property which is exclusively their own and which cannot be taken account of at a general partition. It is simply the coparcenary property, as before defined, that is the subject of partition in the Mitakshara, and in the present Lecture,

(1) What is
the property
to be
divided.

therefore, I shall confine myself to the partition of coparcenary property. As regards the self-acquired property of the father, whatever moral precepts there may be in the texts against their being divided according to the will of the father, the case-law has declared his absolute right over it.* When such property in the hands of the successor becomes ancestral property, it is partitioned under the same rules as coparcenary property.

(2) Who can demand partition.

(2) The Mitakshara law treats of the partition of unobstructed heritage among the coparceners. It not unfrequently happens that the family-property is in the hands of persons who are not coparceners in the technical sense of the term, and in such cases, where the rights of the co-sharers are co-ordinate, any one or more of the sharers can demand a partition. But the Mitakshara considers *only* the case of partition of unobstructed heritage among the coparceners, and we are to consider here, not generally who can demand a partition, but supposing all the coparceners to be alive, which of them can demand partition. Otherwise, as a rule every one of a body of co-ordinate owners can demand a partition.

We have seen before † who the coparceners are who can demand partition. We have seen that they are not all the persons who are the coparceners, nor all who at a partition take shares. Professor Jolly thinks ‡ that the right to demand partition is an innovation on the ancient law. He says:—"It is obvious that partition in order to become a common and established practice, presupposes the existence of a right to demand it on the part of every one of those who are likely to be benefited by it. The absence of such a right

* Ante pp. 105-106.

† Ante pp. 45-47.

‡ Tagore Law Lectures for 1883 p. 97.

as this in the earliest period of the Hindu law is among the clearest proofs of the general prevalence of the joint-family system in that period. No other single family member than the father was allowed to institute a partition on his own account, and whether he would exercise this right or not depended entirely on his discretion. The female family members could never demand a partition. The sons might divide the property after his death by mutual consent, but not at the instance of one single coparcener." And again at p. 125: "That the sons should be authorized in certain cases to demand a partition of their father's self-acquisitions seems a thoroughly anomalous theory no doubt and one strongly opposed to the strong sense of the deference due to elders, which pervades the Indian law. Even this right to demand a partition of ancestral property at any time has been recently contested. Nevertheless it is impossible to doubt that these two propositions are actually contained in the Mitakshara, and that the Mitakshara doctrine has been consistently interpreted in that sense in all the subsequent Digests of the Mitakshara school. The most decisive passage in the Mitakshara itself is in I, 5, 8 where a distribution of the ancestral estate is said to take place solely by the wish of a son, even in spite of the mother being capable of bearing more sons and the father retaining his worldly affections."

(3) Under the Mitakshara, Ch. I sec. 2 there are four periods for the partition of property. Para. 7 provides: "One period of partition is when the father desires separation, as expressed in the text "When the father makes a partition." Another period is while the father lives, but is indifferent to wealth and disinclined to pleasure, and the mother is incapable of bearing more sons; at

(3) Four periods of partition.

which time a partition is admissible, at the option of sons against the father's wish: as is shown by Narada, who premises partition subsequent to the demise of both parents ("Let sons regularly divide the wealth when the father is dead") and adds "or when the mother is past child-bearing and the sisters are married, or when the father's sensual passions are extinguished." Here the words "let sons regularly divide the wealth" are understood. Gautama likewise, having said "After the demise of the father, let sons share his estate" states a second period, "or when the mother is past child-bearing;" and a third, "while the father lives, if he desire separation." So, while the mother is capable of bearing more issue, a partition is admissible by the choice of the sons, though the father be unwilling, if he be addicted to vice or afflicted with a lasting disease. That Sancha declares: "Partition of inheritance takes place without the father's wish, if he be old, disturbed in intellect, or diseased."

Thus the periods are, (1) when the father so wishes, (2) when the father has given up sensual pleasures and the mother has ceased child-bearing, (3) when the mother is capable of child-bearing but the father is addicted to vice, and (4) after the death of the father.

The periods refer to self-acquired property of father.

It seems to me that these four periods relate only to the partition of the father's self-acquired property and not to ancestral property. My reasons for this conclusion are:—

(1) Because in Ch. I sec. 5 para. 8 the son is allowed to claim partition of ancestral estate in the hands of the father *at any time*. The para. says: "Thus, while the mother is capable of bearing more sons, and the father retains his worldly affections and does not desire partition, a distribution of the grandfather's estate does never-

theless take place by the will of the son." This clearly refers to the partition of ancestral property, and it provides that the partition can be demanded by the son *at any time*. Among the four periods mentioned in Sec. II there are two when the son can compel the father to effect a partition. Would this special provision for the two periods have been necessary when the author intended to give the son wider powers in the end?

(2) Because the mention of the four periods appears only in Sec. 2 and in Ch. I sec. 5 para. 7, the author, referring to Sec. 2 para. 1, says that it relates to property acquired by the father himself; while nowhere in the Mitakshara does he say that any of the other paras. in Sec. 2 refer to ancestral property. From these circumstances the inference fairly arises that the author was referring to the same class of property throughout the whole of the Sec. II.

(3) Because the provisions for equal and unequal partition contained in Sec. II, if applied to ancestral property, would contradict the fundamental doctrine of the equality of rights of the father and son in ancestral property preached in Sec. 5 para. 3;—I refer to the text of Yajnavalkya in Book II verse 121, *viz.*, "For the ownership of father and son is the same in land, which was acquired by the grandfather, or in a corrody, or in chattels which belonged to him."

I have stated my reasons at length because Justice Phear, in concurrence with Justice Morris, in *Laljeet Singh v. Raj Coomar Singh* (1873) 12 B. L. R. 373, in inferring the right of a mother to a share at a partition of family-property under the Mitakshara law made during the life of the father, observed that the provisions of Sec. 2 applied generally to partitions of ancestral as well as self-acquired properties of the father, and

in this he was supported by certain observations of Chief Justice Scotland and Justice Bittleston in *Nagalinga Mudali v. Subbirmaniya Mudali* (1862) 1 Mad. H. C. Rep. 77. The decision of Justice Phear that the four periods relate to the partition generally of self-acquired and ancestral property is merely an *obiter dictum*, while the principle of the decision of the Madras Court has been disapproved by the Judicial Committee, see I. L. R. 6 All. 560.

From what has been said above, it is clear that the four periods of partition provided for in Sec. 2 Ch. I relate to the father's own acquisitions. Now, as to these acquisitions at the present day the authority of the father, as we have already seen,* is supreme. It is true that a distinction is often times sought to be made between a partition by a father and a gift by him, and it is contended that a father purporting to make a partition cannot make a gift which, in order that it may be valid, requires acceptance by the donee. But after all, the distinction is not of any practical importance. It has been held that the injunctions against an unequal distribution by the father are mere moral precepts which no Court of law would enforce. A father bent upon making an unequal distribution may do so in more ways than one.

Son can demand partition of ancestral property at any moment.

Sons never attempt to compel their fathers to divide their self-acquired property, and we may dismiss from our consideration the four periods of partition. But as regards ancestral property the son can at any moment demand a partition, (see Sec. 5 para. 8.)

We have seen that property inherited by a father collaterally is treated as self-acquired pro-

perty of the father. That a son cannot demand partition of such property, while the father is alive, will appear from the decision in the case of *Rayadur Nallatambi v. Rayadur Mukunda Chetti* (1868) 3 Mad. H. C. Rep. 455. In *Jasoda Koer v. Sheo Pershad Sing* (1889) 17 Cal. 33, the High Court of Calcutta held that the principles of survivorship did not attach to property inherited from a maternal grandfather, that is, that such property was not unobstructed heritage for the partition of which the son could make a demand against the father while he was alive.

Son cannot demand partition of property inherited by father collaterally.

A question frequently arises as to whether when a father is joint with the uncles, sons can demand partition. On this point see *Subba Ayyar v. Ganasa Ayyar* (1894) 1. L. R. 18 Mad. 179, where all the previous decisions have been reviewed.

But can seek partition when his father and uncles are joint.

(4) We have seen that the term "coparcenary property" is properly applicable to the "unobstructed heritage" only, and that the coparceners are the first three generations of male descendants of the last owner in the direct male line. In the absence of such male descendants the coparcenary property may descend collaterally to other persons and even to females, but in all such cases, as we have already seen, the inheritors take *per capita* and their shares are definite. A partition among the sharers, of property inherited by them by collateral succession, in a word, of obstructed heritage, is either separate enjoyment of the distinct shares or allotment of specific portions of the *corpus* to represent the distinct shares. The collateral heirs are bound to pay the unpaid debts of the last owner and also to maintain persons whom it was the legal or moral duty of the last owner to maintain.

Who are entitled to share.

Partition of obstructed heritage.

Unlike the case of the persons who take by survivorship, the heritage in the hands of collateral heirs is assets of the last owner in their hands, and they are bound to repay all his debts whether of a moral or immoral nature. Collateral heirs, in the same way as the unobstructed heirs, are bound to maintain the impotent, the lame, the blind &c. (all the disqualified heirs or coparceners except the outcast) who if not disqualified would have taken the inheritance in preference to them. They would also be bound to maintain the wives of such disqualified heirs. But we are at present not concerned with the partition of such obstructed heritage. Such heritage may be partitioned under the general rules discussed in Lecture XI.

Partition of ancestral property may take place either among the father and his sons and grandsons, or after the death of the father, among the brothers and their descendants. Let us consider the two cases separately.

Who are incompetent to share.

But before proceeding further, I ought to state that under the Mitakshara, certain persons, otherwise qualified to participate, are disqualified under the following text.*—"An impotent person, an outcast, and his issue, one lame, a madman, an idiot, a blind man and a person afflicted with an incurable disease, as well as others similarly disqualified must be maintained; excluding them, however, from participation." Yajnavalkya Book I. V. 140 quoted in Mitakshara ch. II. sec. X. para 1.

Vijnaneswara defines, (1) "an impotent person" as "one of the third gender," (2) "An outcast" as "one guilty of sacrilege or other heinous crime," (3) "His issue," as "the offspring of an outcast,"

* A& XXI of 1850 has to a great extent modified the law as to the exclusion of *outcasts* in general.

(4) "Lame" as "one deprived of the use of his feet," (5) "A madman" as "one affected by any of the various sorts of insanity proceeding from air, bile or phlegm, from delirium or from planetary influence," (6) "An idiot" as "a person deprived of the internal faculty; meaning one incapable of discriminating right from wrong," (7) "Blind" as "one destitute of the visual organ," and (3) "Afflicted with an incurable disease" as "one affected by an irremediable distemper such as *marasmus* or the like." Under the term "others" are comprehended "one who has entered into an order of devotion, an enemy to his father, a sinner in an inferior degree and a person deaf, dumb or wanting any organ." Mit. ch. II. sec. X. para. 3.

'These persons are debarred of their shares if their disqualification arose before the division of the property.' Mit. ch. II. sec. X. 6. 'But one already separated from his co-heirs is not deprived of his allotment, and if the defect be removed by medicaments or other means as penance or atonement at a period subsequent to partition, the right of participation takes effect by analogy to the case of a son born after separation.' Mit. ch. II. sec. X. 7. But though the persons above enumerated are excluded from participation, their sons are entitled to allotments if free from defects.* To this again there is an exception: the adopted son of a disqualified heir does not take any share Mit. ch. II sec. X para. 11; Chandrika sec. VI para 1.

Their sons
free from
defects.

Their adop-
ted sons.

In connection with this subject, let me point out to you a well-considered decision of the Madras High Court as to the right of a son of a disqualified heir to participate, when such son is born after the death of the grandfather and the actual partition. A Full Bench of the Madras

Son of a
disqualified
heir born
after parti-
tion.

**Krishna v.
Sami.**

Court in *Krishna v. Sami* (1884) I.L.R. 9 Mad. 64, held that such sons were entitled to participate to the extent of their full share in the family-property. This decision gives a summary of almost the whole subject of partition under the Mitakshara, and I shall at this place quote certain passages, from the judgment bearing on the subject.

Sir Charles Turner, C. J., speaking generally of the provisions of the Mitakshara, said:—"A right of maintenance was assigned to members of the family whose claims to inherit were postponed to preferable heirs, or whose possibility of inheritance had been lost, or who were disqualified for inheritance. Sons as coparceners with equal rights with their father in ancestral estate might compel the father to divide that estate and retain but a single share for himself; but they could not compel him to divide his self-acquired property, and, if he was willing to do, he might retain a double share of it for himself and must make his wives participants of shares equal to those of sons, unless separate property had been given to them and in that case they received half shares. There was thus secured to the parents a fund for children who might be born after partition. The child, if a son begotten before partition, was entitled to reopen the partition and receive a share equal to that of his brothers; if begotten after partition, he inherited what wealth remained to his father and all the father's subsequent acquisitions, and, if there were no daughter, he solely inherited his mother's portion also. The case in which a son born after partition would receive nothing is not contemplated by any of the authors of the texts and commentaries to which we have had access except Varadaraja in the Vyavahara Nirnaya in a passage to which reference will presently be made.

"The text of Manu as to the right of a son born after partition is as follows :—"A son born after a division shall alone inherit the patrimony or shall have a share of it with the divided brethren if they return and re-unite themselves with him"—Chap. IX, s. 216.

"Yajnavalkya, after declaring that a father may make a partition in his lifetime, and under some circumstances unequally, and that brothers after the father's death must make an equal partition, notices the case of the son born after partition : "When (after) the sons, &c., have separated, a son is born of a wife of the same class, he becomes a partaker of a share, or his allotment should be made out of the visible estate corrected for profit or loss." Yajnavalkya II s. 123.

"There is also a text of Brihaspati : "A son born before partition has no claim on the wealth of his parents, nor one born after it on that of his brother," and again "all the wealth which is acquired by the father himself who has made a partition with his sons goes to the son begotten by him after the partition. Those born before it are declared to have no right." Mitakshara I, 6, s. 6.

"Vijnaneswara commenting on these three texts observes that, the sons being separated from their father, one who shall be afterwards born of a wife equal in class shall share the distribution, and explains that the distribution means what is distributed, in other words the share of the father and the share of the mother, if there be no daughter. He deduces from the text of Manu that sons born previously to the distribution have no property in the share of the separated father and mother, and that a son born to separated parents is not a proprietor in his brother's allotments, but, as shown by the text of Brihaspati, is entitled to the property acquired by the father

subsequently to partition as well as to the father's share. He meets the case suggested of a division after the father's death, wherein the father would receive no share, by deducing a rule from the last portion of Yajnavalkya's text. The posthumous son, whose mother's pregnancy was not manifest at the time of partition, must receive, out of his brother's allotments, a share equal to their shares after computing the income which has accrued and the father's debts that have been discharged.

"As to the rights of sons born after partition, Devanna Bhatta, quoting the text of Vishnu that a son with whom a father has made a partition should give a share to the son born after the distribution (Vishnu, ch. XVII, s. 2) explains that it refers to a partition made when the fact of the existing pregnancy of the mother was unknown—Smṛiti Chandrika, ch. XIII, ss. 1, 2. He then refers to the text of Gautama, XXVIII, s. 29 "—A son begotten after partition takes the wealth of his father only : " (it may be observed this text is otherwise translated "takes exclusively the wealth of his father" the term "eva" being referred to the taker and not to the wealth ; but the sense is much the same). On this text Devanna Bhatta observes—"The reason why a son born after partition has no claim on the paternal wealth is because he has divided off from his father, and the reason why a son begotten after the partition has no claim on the wealth of the brother is because such a brother possesses no property in which the son born after the partition can have an interest. Thus it must be understood."—Smṛiti Chandrika, ch. XIII s. 8. After adverting to a text of Brihaspati as to all the self-acquired wealth of the father, the commentator observes the term "all" was used to preclude the supposition that in the wealth acquired by the father subsequent to parti-

tion, the sons born before the partition have a claim to share, no share having previously been obtained by them in it. Hence he concludes that the sons born before partition and the sons born after it have no claim whatever on each other's wealth, and in this respect they are viewed as if they were not at all related to each other—S. 11.

“The same commentator, quoting the text of Yajnavalkya before cited, explains it as referring to a partition made by brothers on the demise of their father while the pregnancy of the father's widow was not manifest.

“The author of the *Sarasvati Vilasa*, following Vijnaneswara, interprets the first part of the text of Yajnavalkya as applying to the son begotten after partition, and the last part of the text as applying to the son born of a mother whose pregnancy existed but was unknown at the time of partition. *Sarasvati Vilasa*, 227—239.”

The learned Chief Justice, referring to the question of repartition upon the appearance of a co-heir, says:—“An argument that the share obtained by partition may be divested in part by the appearance of a co-heir, whose right was not anticipated at the time of partition, may, however, be deduced from the rule respecting the absent coparcener and his descendants. This rule, the author of *Sarasvati Vilasa* considers analogous to the rule respecting the son born after partition—*Sarasvati Vilasa*, 240.”

Referring to the circumstance of the disqualified heirs subsequently being cured of their defects the judgment proceeds:—“The Hindu law did not take thought only for those members of the family who were competent to discharge sacrificial functions, and while it saw the wisdom of restraining the disqualified from dealing with the family wealth, it secured to them maintenance during

disqualification and a restoration to their rights when that disqualification ceased." And again, "The right of the disqualified person to inherit, if he is cured of his disqualification, is likened to the right of a son born after partition. The son born after partition may be a son begotten and born after partition in his father's lifetime. He may be a son begotten before partition and born after it in his father's lifetime. He may be a son begotten before partition and born after it when the partition has been made after the father's death. The common feature in all three cases is that he takes a share in the wealth. In the first case he takes the shares of his parents and acquisitions made after partition, or, if his father has reserved no share, he may call upon his brothers to make up a share to him. In the second and third cases he takes a share made up out of the shares of his brothers. In no case is he excluded altogether although the estate may have vested."

Referring to the contention that an estate once vested cannot be divested the learned Chief Justice said:—"That the rule prohibiting the divesting an estate once vested in a full owner cannot be laid down without exceptions, in respect of property governed by the law of the Mitakshara, appears to be established by admitted rules and by judicial decision.

"A, who after his father's death becomes the sole and absolute owner of the wealth in which on his birth he had become a co-owner with his father, marries and has a son B born to him. His absolute estate is immediately converted into a coparcenary estate, and as other sons C and D are born, the interests of A and B are practically curtailed by the admission of new coparceners. It is true that while the estate remains copar-

cenary it is vested as a unit in all the male members, and that the diminution in the interest which each member would take on a partition is not strictly a divesting, though it must be remembered that the right vests in birth and not on partition. But let a partition be made in A's lifetime and let him reserve no share for himself and then let a son E be born to him who was not in the womb at the time of partition. We have authority for saying he would be entitled to require his brothers to contribute out of their allotments so that all might receive an equal portion of the family wealth.

"Again, let the eldest son B have gone to a foreign country and let his brothers in his absence make a partition of the family wealth: a share is not necessarily set apart for him: the time may have elapsed when it may reasonably be believed he was dead. According to Hindu law, which does not in other cases ignore limitation, he may, after seven generations return and claim to have a share or a half share made up to him out of his brothers' allotments.

"Again, let C have died before partition, leaving a widow and having given her power to adopt which she does not exercise till after a partition has been made by B, D and E. When she exercises her power we apprehend that the adopted son would be entitled to call upon his uncles to make over to him a portion of the wealth equal to that which would have been taken by his father—*Sri Raghunada v. Sri Brozo Kishoro L.R.*, 3 I. A. 154; I. L. R. 1 Mad. 69. * * *

"A case, however, arose in this Presidency and went before the Judicial Committee in which an estate was divested from a full male owner by reason of an adoption made by a widow.

"An impartible zemindari the property of two

undivided brothers was in the possession of the elder. On his death leaving a widow and no male issue, the brother became entitled by survivorship to the entire estate. The widow made a valid adoption to her husband and it was held, the adopted son was entitled to possession of the zemindari—Sri Raghunadha v. Sri Brozo Kishoro L. R. 3 I. A. 154; I. L. R. 1 Mad. 69.”

Who are the persons entitled to share

We are now in a position to say who the persons are who share at a partition of the coparcenary property made during the lifetime of the father. They are in a word the coparceners who are not disqualified under the above rules. Now, the coparceners are the first three generations of male descendants in direct male line *i.e.*, the sons, grandsons and great-grandsons of the last owner. The rights of the sons of the last owner being equal, it is convenient to take the case of one of these sons and to treat him as the head man of the family. He may now be represented as the father and the two succeeding generations as his sons and grandsons. The shares of the father and each of his sons are equal in the ancestral property under the text of Yajnavalkya quoted before.* Grandsons whose fathers are alive do not take separately: they take along with their father—Grandsons whose fathers are dead represent† their deceased fathers at the partition *i.e.*, they take *per stirpes* the shares of their deceased fathers. The adopted son of a son when an exclusive heir succeeds to the estate of his grandfather like a natural-born grandson. Where there is a son, and the adopted son of a predeceased son, the grandson by adoption does

Sons.

Grandsons.

Adopted sons and adopted sons of sons.

* Book II verse 121. “For the ownership of father and son is the same in land, which was acquired by the grandfather, or in a corrody, or in chattels which belonged to him.”

† Mitak. ch. I sec. V. para. 3.

not take the share of his father, but the share which his father would have taken if he had himself been an adopted son.—Dattaka Chandrika V. 25.

At a partition of family-property when there is a competition, an adopted son and the adopted son of a natural son stand exactly in the same position, and the adopted son of a natural son takes only half of the share which he would have taken if he had been a natural son. *Raghubanund Doss v. Sadu Churn Doss* (1878) I. L. R. 4 Cal. 425.

It has now been settled by a long series of decisions that at a partition of the ancestral property, each of the wives of the father receives a share: *vide* *Sheo Dyal Tewaree v. Judoonath Tewaree* (1868) 9 W. R. 61; *Mahabeer Persad v. Ramyad Sing* (1873) 12 B. L. R. 90; *Laljeet Sing v. Raj Coomar Sing* (1873) 12 B. L. R. 373; *Bilaso v. Dinanath* (1880) I.L.R. 3 All. 88; *Pursidnarain Sing v. Honooman Sahay* (1880) I.L.R., 5 Cal. 845; *Sumrun Thakoor v. Chunder Mun Misser* (1881) I.L.R., 8 Cal. 17; and *Damoodur Misser v. Senabutty Misrain* (1882) *Ibid* 537. Wives.

As regards the portions of the wives, *Yajnavalkya* in Book II. V. 115 quoted in *Mitakshara* ch. I. sec. II para. 8, says—"If he make the allotments equal, his wives to whom no separate property has been given by the husband or the father-in-law must be rendered partakers of like portions." This verse is read in connection with verse 148 the last words of which are; "but, if any have been assigned, let him allot half." The case-law on the subject has settled that, where the wife has *stridhan* given to her by her husband, she would be entitled only to so much as, with her *stridhan*, would make her share equal to that of a son. This view is in accordance with the leading Hindu authorities of all the schools: See *Jodoonath Dey v. Brojonath Dey* (1874) 12 B.L.R. Their portions.

385; Kishori Mohun Ghosh v. Moni Mohun Ghosh (1885) I.L.R. 12 Cal. 165; Mitakshara ch. I. sec. II. para. 9; Dayabhaga chap. III. sec. II. para. 31; and Mayukha IV. 17.

Unmarried daughters.

Touching the rights of unmarried daughters to share (the married who belong to a different family having no claim), Professor Jolly on p. 103 of his Lectures says: "The rules regarding the shares of unmarried daughters relate exclusively to the case of partition after the father's death. Thus it is ordained by Manu (IX. 118), Brihaspati and Katyayana that the sisters shall receive a quarter of a share from their brothers; and Yajnavalkya (II. 124) gives the same rule, adding that her marriage expenses shall be defrayed out of such property. Devala ordains generally that the daughters shall receive a marriage portion from the paternal wealth. Vishnu (XV 31) directs that they shall be married by their brothers in a manner correspondent with the amount of the paternal property. Sankha says that on a division of the estate a maiden daughter shall receive ornaments, and Stridhana for nuptials. As before division, the obligation to marry maiden sisters and other unmarried females was among the principal charges on the estate, it was but natural that a certain amount should have been set apart for that purpose when the estate was divided. It deserves to be noticed that the rule regarding the fourth share does not make its appearance before the period of the metrical Smṛiti. Some of these works go much further than this. Narada (XIII. 13) makes her right equal to that of a younger son, when the father distributes the estate. Katyāṇa awards a son's share to the maiden daughter when the estate is very small. But during the life of the father the provision to be made for the daughter continued to be left entirely to his dis-

cretion, and the wives and daughters of disqualified heirs and deceased coparceners have never advanced beyond a claim to be maintained or provided for in marriage by the co-heirs." On this point see the decision in *Damoodur Misser v. Senabutty Misrain* (1882) I. L. R., 8 Cal. 537. See also *Mitakshara* ch. I sec. VII. paras 5-14.

When ancestral property is in the joint possession of brothers, it has been held by the Madras High Court that the son of one of the brothers may compel his father to effect a partition.—*Subba Ayyar v. Ganasa Ayyar* (1894) I. L. R., 18 Mad. 179. But the Bombay Court held otherwise—*Apaji Narbar Kulkarni v. Ram Chandra Ravi Kulkarni* (1891) I. L. R. 16 Bom. 29. See also *Rai Bishen Chand v. Mussamut Asmaida Koer* (1883) I.L.R. 6 All. 560; L. R. 11 I. A. 164.

Son cannot demand partition when his father is joint in estate with his uncles.

With respect to the right of a grandmother to a share see *Badri Roy v. Bhugwat Narain Dobey* (1882) I. L. R., 8 Cal. 649 where it was held that at a partition of ancestral property where the family consisted of a father, mother, a grandmother and a son, the grandmother was entitled to a fourth share and so too, the mother. But the Allahabad Court in the same circumstances has held the grandmother not entitled to a share: see *Radha Kishenman v. Bachaman* (1880) I. L. R. 3 All. 118.

Grand-mother.

When a son is born after a partition made during the lifetime of the father, such son may have been begotten either before, or, after, partition and he may be born either during the father's lifetime or after his death. In each of these cases he would take the whole of his father's share, and, if there be no daughter, the whole of his mother's property (see paras. 2 and 3 sec. VI, ch. I).

After-born son.

The author of the *Mitakshara* in ch. I sec. VIII treats of the shares of sons belonging to different

Sons of different tribes.

tribes at a partition among *brethren* dissimilar in class *i.e.*, after the father's demise. He does not discuss their shares at a partition made by the father. It seems doubtful, therefore, whether sons belonging to a different class from the father can demand a partition. But it is clear that when a partition is made by the father, these sons would also be entitled to shares, and that their shares would be the same as at a partition after the father's demise.

There are, as you know, four tribes the *Brahmana*, the *Kshatriya*, the *Vaisya* and the *Sudra* occupying the ranks as they have been here named. In former days a *Brahmana* could marry a girl in any of the four tribes, a *Kshatriya*, in any of the three lower tribes, a *Vaisya*, in either of the last two and a *Sudra*, in his own tribe only, and it was not allowable for a girl in any of the three higher tribes to marry a male of a lower tribe than herself. The sons of such connections were entitled to share at a partition in competition with other sharers.

Yajnavalkya in Book II verse 125 says : "The sons of a *Brahmana* in the several tribes have four shares or three, or two, or one : the children of a *Kshatriya* have three portions, or two, or one, and those of a *Vaisya* take two parts or one." The commentator in para. 4, sec. VIII. ch. I. explains it thus :—

"The sons of a *Brahmana* by a *Brahmani* woman take four shares, apiece ; his sons by a *Kshatriya* wife receive three shares each ; by a *Vaisya* woman, two ; by a *Sudra* one." Similar interpretations have been given in paras. 5, 6, and 7 with regard to a *Kshatriya*, a *Vaisya* and a *Sudra*.

You will understand from this that where a *Brahmana* has a son by a woman of the same tribe and also a son by a *Kshatriya*, the shares of the son by the *Kshatriya* woman and of the son

by a *Brahmani* will be as 3 is to 4. In modern times such marriages are unknown, and I need not therefore stop to consider the details.

Several kinds of sons by adoption were made in former days. Of these, two kinds, *viz.*, the *dattaka*, or son given in adoption, and the *kritrima*, or son made, are the forms now chiefly in vogue. The *Kritrima* son is created by contract and the relationship exists between the contracting parties only. Generally, when a man has no son, he makes a *kritrima* son on his death-bed for the purpose of creating an heir and providing for the performance of his *Shrad*. The creation of such a son does not require any formalities, and when a female creates such a son, he does not inherit her husband. We may dismiss from our consideration the case of such sons, as they are never made where natural sons exist, and as they depend for their portions upon the persons who make them.

Adopted
sons.

Kritrima
son

But *dattaka* sons are for purposes of inheritance the same as natural-born sons. They are co-owners with their adoptive fathers in ancestral property from the date of their adoption (*Rambhat v. Lakshman Chintaman* (1881) I. L. R., 5 Bom. 630). They may demand partition from their adoptive fathers. They may prevent their adoptive fathers from unnecessarily alienating ancestral property (*Rungama v. Atchama* 4 M. I. A. 1; *Sudanaund Mahapatra v. Soorjoo Monee Dayee* (1869) 11 W. R. 436; *Rambhat v. Lakshman Chintaman* (1881) I. L. R. 5 Bom. 630.) They succeed their coparceners by survivorship in the same way as *aurasa* sons.

Dattaka son.

A son cannot be taken in adoption in the *dattaka* form when an *aurasa* son (son of the body) exists. And a man only takes an adopted son when he has, according to his ideas, no hopes

Shares of a
natural and
adopted son
in competi-
tion.

of getting an *aurasa* son. It sometimes, therefore, happens that after he has taken an adopted son, an *aurasa* son is born to him. In such circumstances, there is a competition between the natural-born son and the adopted son for shares at a general partition, and our ancient law-givers have made provision for the same at a partition among the sons. There are no special provisions for the shares of the natural son in competition with an adopted son, when the partition is made by the father, but the proportions will evidently be the same in both cases. Vijñaneswar says—"So the allotment of a quarter share to other inferior sons, when a superior one exists, has been ordained by *Vasishtha*: 'When a son has been adopted, if a legitimate son be afterwards born; the given son shares a fourth part.'" Here the mention of a son given is intended for an indication of others also, as the son bought, son made by adoption and (son self-given and) the rest: for they are equally adopted as sons."—(Mit. I. XI. 24). And again "Accordingly Catyayana says:—"If a legitimate son be born, the rest are pronounced sharers of a fourth part, provided they belong to the same tribe; but, if they be of a different class, they are entitled to food and raiment only."—(Mit. I. XI. 25).

In the Dattaka Chandrika V. 16, the reading is a third. Professor Golap Chandra Sastri in his Lectures for 1888 (page 399) says:—"But the Madras High Court have held upon the authority of the Sarasvati Vilasa, that an adopted son takes one-fourth of the real legitimate son's share, that is to say, each begotten son is to be considered equal to four adopted sons. Expressions like quarter share may be construed in another way; according to the Mitākshara a maiden daughter is declared to be entitled to a quarter share on

partition of her father's estate being made by her brothers; and the quarter share is ascertained in this way—divide the property into as many shares as there are brothers and maiden sisters, divide one such share into four parts, allot one such part to each of the maiden sisters, and then distribute the residue amongst the brothers equally. Nanda Pandita appears to indicate that the quarter share of an adopted son is to be similarly determined."

Mr. Mayne in his work on Hindu Law and Usage § 157 says:—"Whatever may have been the original meaning of the texts, a difference of usage seems to have sprung up, according to which the adopted son takes one-third of the whole in Bengal, and one-fourth of the whole in other Provinces which follow the Benares law. The Madras High Court, however, have decided on the authority of the *Sarasvati Vilasa*, that the fourth which he is to take is not a fourth of the whole, but a fourth of the share taken by the legitimate son. Consequently the estate would be divided into five shares, of which he would take one, and the legitimate son the remainder. A similar construction has been put upon the texts in Bombay. Nanda Pandita suggests as further explanation, that he is to take a quarter share; *i. e.*, a fourth of what he would have taken as a legitimate son, that is to say, a fourth of one-half or one-eighth. Where there are several after-born sons, of course, the shares will vary according to the principle adopted. Supposing there were two legitimate sons, then, upon the principle laid down by Mr. MacNaghten, the estate would be divided into seven shares in Benares and into five shares in Bengal. According to the *Sarasvati Vilasa*, it would be divided into nine shares, the adopted son taking one share

in each case. According to Nanda Pandita he would take one-twelfth. Among various castes in Western India the rights of the adopted son vary from one-half, one-third and one-fourth, to next to nothing, the adoptive father being at liberty, on the birth of a legitimate son, to give him a present and turn him adrift."

In *Ayyavu Muppanar v. Niladatchi Ammal* (1862) 1 Mad. H. C. Rep. 45, it was held that the share of an adopted son was one-fourth of the share of a son born to the adoptive father after the adoption. It is convenient to state the shares of the natural and the adopted son in the proportion of 4 to 1. The result is, that if there are two *aurasa* sons, they together would get eight shares, while the adopted son would get one, and if the partition takes place during the father's lifetime, the father would get a share equal to that of an *aurasa* son. But the Bombay High Court in *Giriapa v. Ningapa* (1892) I. L. R., 17 Bom. 100, held that the adopted son was entitled to a fifth of the entire estate upon the subsequent birth of an *aurasa* son. In *Raghubānund Doss v. Sadhu Churn Doss* (1878) I. L. R., 4 Cal. 425, the High Court of Calcutta held that an adopted son and an adopted son of a natural son under the Mitakshara shared equally.

Adopted son
and adopted
son of
natural son.

Effects
discovered
after parti-
tion.

As to effects liable to partition being discovered after a partition, Yajnavalkya in Book II, verse 126 says: "Effects which have been withheld by one co-heir from another and which are discovered after the separation, let them again divide in equal shares: This is a settled rule."

Partition
after
father's and
mother's
death.

The Mitakshara does not contemplate the question of partition after the death of the father while yet the mother is alive. It is owing to this circumstance that no share is provided for the mother in the Mitakshara in the event of

a partition among the brothers. But, when considering the question of maintenance in Lecture II, we saw that a mother was entitled to maintenance, and we have now seen that at a partition by the father, his wife would be entitled to a share equally with her sons. From these circumstances, the case-law has settled that a mother is entitled to a share equal to that of a son (see *Damoodur Misser v. Senabuttu Misrain* (1882) I. L. R., 8 Cal. 537; 10 C. L. R. 401, and *Isree Pershad Sing v. Nasib Kooer* (1884) I. L. R., 10 Cal. 1017.)

The rules applicable to a partition made during the lifetime of the father apply to a partition made after his demise. The only modifications are (1) that the father being dead, the share which he would have taken is merged in the family-property and goes to increase the shares of the survivors, (2) that upon the birth of a posthumous son after partition, the whole of the proceedings are re-opened to provide for the newborn son, (see chapter I sec. VI paras. 8, 9 & 10,) and (3) when a Sudra father has left a* son begotten by him on a female slave and also sons born in lawful wedlock, the former would get a moiety of a lawful son's share at partition (*Yajnavalkya* II, 134 quoted in *Mitakshara* ch. I sec. 12 para. 1).

A partition regularly made may be re-opened in the following cases :—

(1) When a coparcener entitled to a share was absent at partition and subsequently turns up.—*Sarasvati Vilasa* 240.

(2) If a partition is made after the death of the father and a brother who was conceived before is born afterwards, the partition may be re-opened,

When partition is re-opened.

At instance of absent member.

At instance of after-born son.

* *Jogendro Bhupati Hurro Chundra Mahapatra v. Nityanand Man Sing* (1890) I. L. R. 18 Cal. 151; *Thangam Pillai v. Suppa Pillai* (1888) I. L. R. 12 Madras 401.

—Mit. ch. I sec. VI para. 8 and *Krishna v. Sami* I. L. R., 9 Mad. 64.

Upon removal of disqualification.

(3) If on account of the disqualification of any coparcener at the time of partition he be excluded, then upon the subsequent removal of the disqualification, the partition proceedings may be re-opened to allow the coparcener a share. The Mitakshara views him as a son born subsequently to the partition. If the partition took place during the father's lifetime, the newly qualified son would be entitled to the father's "distribution" in the same way as a son born after partition—See ch. II sec. X para. 7. The Mitakshara law does not expressly provide for the case when the partition takes place after the father's death, but in *Krishna v. Sami* (1884) I. L. R., 9 Mad. 64, the Madras Court held that the partition proceedings might be re-opened to provide for the newly eligible sharer.

(4) In the same case it has been held that upon the birth of a son, free from defects, to a disqualified coparcener, after partition, the partition proceedings may be re-opened to make up an allotment for the newly born son supposing him to be one who would have been a sharer if he were in existence at the date of the partition. But the correctness of this decision is questionable: it is very dangerous to draw inferences on questions of Hindu law from analogy.

Minors.

I have already in a previous Lecture† cited cases to show that even a minor can demand partition on proof of malversation. Thus *Baudhayana* II. 2. 3. para. 36 says. "Let them carefully protect the shares of those who are minors as well as the increments thereon. This seems to imply that even in the days of our ancient Rishis, a legal partition could be effected during the minority of some of

the coparceners. There is also a text of Katya-yana which ordains that 'the wealth of the minors and absent coparceners should be deposited free from disbursement with relatives and friends.'

Let us now consider the effect of a partition regularly made. Brihaspati quoted in Mitakshara ch. I sec. VI para. 4 says :—"A son born before partition has no claim on the wealth of his parents." In paras. 5 and 6 sec. VI ch. I Vijnaneswara says : "One, born previously to the distribution of estate, has no property in the share allotted to his father and mother who are separated (from their elder children) : nor is one born of parents separated (from their children) a proprietor of his father's allotment." Thus, whatever has been acquired by the father in the period subsequent to partition, belongs entirely to the son born after separation. For, it is so ordained : 'All the wealth, which is acquired by the father himself, who has made a partition with his sons, goes to the son begotten by him after the partition : those, born before it, are declared to have no right.' "

Effect of
partition.

As to the effect of a partition among widows or daughters, see *Rindnamma v. Venkatara Mappa* (1866) 3 Mad. H. C. R. 268 and *Sengamalatham v. Valayuda Mudali* (1867) 3 Mad. H. C. R. 312. In this latter case, Bittleston, C.J., in concurrence with Justice Ellis, observed (p. 317) : "Though sisters or co-widows may divide, the division will not alter the course of succession as Sir F. M'cNaghten (p. 55) says 'among sisters or co-widows a division cannot be productive of more than convenience to the partitioning parties themselves ; it will not give any of them a right to dispose of her separate share, or in any manner vary the rules of inheritance.'" In the former case the same judges held that, except where each

of the widows made an absolute surrender of her interest, she would not lose her right of survivorship. On this point see also Bhugwan Deen Doobey *v.* Myna Bae (1868) 11 M. I. A. 487; 9 W. R., P. C., 23.

Why sons
do not
more fre-
quently
seek parti-
tion during
father's
lifetime

In a country where respect for age is a characteristic of the people, and where the Sacred Codes enjoin that the parents are objects of worship, it is no wonder that a father should be looked upon with veneration by his sons. Many a son, therefore, who might secure some pecuniary advantage by an early separation from their father prefer to live under his protection. They take pleasure in obeying his behests, and look upon every act which is likely to incur his displeasure as sinful. This is the predominant idea that keeps the sons together under the father. But apart from these considerations, it is not always to the advantage of the son to seek separation from his father; for, he thereby deprives himself of the whole or portions of the separate allotments of his father and mother, and also of the father's subsequent acquisitions which oftentimes are 'considerable. There is a further consideration; and it is this, that by separation a man deprives himself of the rights which accrue by survivorship.

Re-union.

It remains for me now to consider the subject of re-union under the Mitakshara.

Vijnaneswara devotes a whole section (IX of chap. II) to the consideration of this subject. According to him, "effects which had been divided and which are again mixed together are termed re-united, and he to whom such appertain is a re-united parcener" (para. 3.) But according to Brihaspati this cannot take place with any person indifferently, but only with a father, a brother, or a paternal uncle." Vaçhaspati Misra, an authority in Mithila, maintains: "The first principle of re-

Only among
certain
relations.

union is the common consent of both the parties, and it may be either with the co-heirs or with a stranger after the partition of wealth (Vivada Chin-tamani translated by Prosunno Coomar Tagore, p. 301). The Mayukha holds that the re-union must be with some or all of the persons who made the first partition (Vyavahara Mayukha ch. IV, sec. 9 para. 1).

Yajnavalkya says (Book II. V 138) :—"A re-united brother shall keep the share of his re-united co-heir who is deceased; or shall deliver it to a son subsequently born." Again (138a) : "But an uterine or whole brother shall thus retain or deliver the allotment of his uterine relation." So too (139) : "A half brother being again associated may take the succession, not a half brother though not re-united; but one, united by blood though not by coparcenary, may obtain the property: and not exclusively the son of a different mother."

Brothers of
whole and
half blood.

In the above quotations, the term "half-brother" is used to denote one born of a rival wife (para. 8).

From the above, you will perceive that, when brothers of the whole blood and of the half blood are all re-united, the brothers of the whole blood succeed in preference to those of the half blood, and that where brothers of the half blood are re-united while brothers of the whole blood are separate, the brothers of the whole and half blood inherit together, and further that a half brother not re-united does not take the inheritance: see the cases of *Tara Chand Ghose v. Pudum Lochun Ghose* (1866) 5 W. R. 249; *Gopal Chunder Daghoria v. Kenaram Daghoria* (1867) 7 W. R. 35; *Ramhari Sarma v. Triharam Sarma* (1871) 7 B. L. R. 336; 15 W. R. 442; *Kesab Ram Mahapattar v. Nand Kishor Mahapattar* (1869)

3 B. L. R., A. C., 7; and *Abhai Churn Jana v. Mangal Jana* (1892) I. L. R., 19 Cal., 634. These, it is true, are all cases under the Dayabhaga, but in this respect there is no difference between the Dayabhaga and the Mitakshara. In *Ramasami v. Venkatesam* (1892) I. L. R. 16 Mad. 440, it was held that the adopted son of a re-united half brother succeeded equally with two unassociated full brothers. But the correctness of this decision seems questionable.

Incomplete
partition.

In the section treating of re-union, Vijnaneswara considers the case of a partition commenced but not concluded by delivery of possession. He says, in para. 13: "Among re-united brothers, if the eldest, the youngest or the middlemost, at the delivery of shares (for the indeclinable termination of the word denotes any case); that is, at the time of making a partition, lose or forfeit his share by his entrance into another order (that of a hermit or ascetic,) or by the guilt of sacrilege or by any other disqualification; or if he be dead; his allotment does not lapse, but shall be set apart. The meaning is that the re-united parceners shall not exclusively take it. The author states the appropriation of the share so reserved: "His uterine brothers and sisters &c." (§ 12). Brothers of the whole blood or by the same mother, though not re-united, share that allotment so set apart. Even though they had gone to a different country, still, returning thence and assembling together, they share it: and that "equally"; not by a distribution of greater and less shares. Brothers of the half blood, who were re-united after separation, and sisters by the same mother likewise participate. They inherit the estate and divide it in equal shares." You will note that this is the only instance where brothers and sisters are said to inherit equally.

The onus of proving re-union, when once separation has been established, will always lie on the party pleading re-union. What is necessary to be proved will appear from *Ramhari Sarma v. Trihiram Sarma* (1871) 7 B. L. R. 336. Mere dwelling under the same roof does not constitute re-union.

Onus to
show re-
union.

Then again, as re-union would consist in the uniting together of the effects taken at a partition, there is nothing to prevent a partial re-union. In the case of a partial re-union in respect to *some* of the properties, the rules of succession to re-united property would be those applicable to joint property, while the rules applicable to self-acquired property would apply to divided property.*

* See discussion ante pp. 314-315.

LECTURE X.

Partition under Dayabhaga and Mahomedan Law.

What is partition under Dayabhaga—Contrast between Partition under Dayabhaga and that under Mitakshara—Evidence of partition under Dayabhaga—Partition has important results attached to it under Mitakshara—But not so under Dayabhaga—Sons cannot demand partition against father's will—Sons have no ownership in father's wealth—Any one coparcener may seek partition—Two periods of partition—Father may retain double share—Unequal division by father allowable—Partition, after father's demise—Among heirs only—Sons, grandsons and great-grandsons—'Sons' include adopted sons and sons by women of different tribes—But the sons &c. must not be disqualified—Other heirs who jointly inherit are similarly related and take *per capita*—Division among sons, grandsons and great-grandsons when all inherit simultaneously—Texts—Cases—Mother's share at partition among sons—Step-mother cannot claim from her step-sons—When father makes partition each of his childless wives entitled to share—maintenance of mother is charge on her sons' (not step-sons') share—Mother's share when she has separate property—Mode of determining mother's share at a division among her sons—Paternal grandmother's share—Unmarried daughter's share—Her share means funds sufficient for her nuptials—Who are disqualified to inherit—They must be supported except the outcast—Their childless wives too—their daughters to be married, and, till then, maintained—After-born brother—Absent coparcener—Sons by women of different tribes—Competition between a natural and an adopted son—Brothers of whole blood and half-blood—Who may re-unite—Partition among co-widows—among daughters—Survivorship among co-widows and daughters—Interest which a widow has in share allotted at partition for her maintenance—agreement not to separate—Mahomedan law of partition—of inheritance—interest taken by female heirs—Special law as to wills.

What is
partition.

• •

Partition according to the Dayabhaga "consists in manifesting, or in particularizing, by the casting of lots or otherwise, a property which had arisen in lands or chattels, but which extended only to a portion of them, and which was previously

unascertained, being unfit for exclusive appropriation, because no evidence of any ground of discrimination existed"—Dayabhaga ch. I para. 8. Contrasting this definition with that given in the Mitakshara (ch. I sec. I para. 4*) you will find that partition under the Mitakshara consists, first, in the ascertainment of the shares in the *corpus*, which previously had no existence, and secondly, in the separating of such shares from one another; while that under the Dayabhaga consists only in the separating of the previously existing shares from one another. You will also observe that separate enjoyment of the distinct shares is of the essence of partition under both the systems of Hindu law, and that it is not necessary that the partition should be by metes and bounds.

Contrast between partition under Dayabhaga and that under Mitakshara.

We have in the preceding† Lecture seen what facts the author of the Mitakshara thinks should be proved in order to establish the *factum* of partition. Jimutvāhana adds—"The proof is by the circumstance of separate transaction of affairs as it is stated by Narada,—"gift and acceptance of gift, cattle, grain, house, land and attendants, must be considered as distinct among separated brethren as also diet, religious duties, income and expenditure. Separated, not unseparated, brethren may reciprocally bear testimony, become sureties, bestow gifts and accept presents. Those, by whom such matters are publicly transacted with their co-heirs, may be known to be separate even without written evidence."—ch. XIV, para. 7.

Evidence of partition under Dayabhaga.

To a partition under the Mitakshara are attached important consequences, not only as regards the enjoyment of the allotments by the separated owners, but also as regards the powers

Partition has important results attached to it under Mitakshara.

* See ante p. 293.

† Ante pp. 295-310.

But not so
under
Dayabhaga.

of alienation possessed by the owners and the succession to such allotments. As regards the enjoyment of the allotments by the separated co-sharers, the same results follow a partition under the Dayabhaga; but in other respects no important results are connected with a separation under the Dayabhaga. Thus, whether a member of a family under the Dayabhaga dies joint or separate, his heirs are the same persons, and whether he separates off his share or keeps it joint with others, he can always alienate his interest. It is perhaps due to this small importance of the subject of separation under the Dayabhaga that we hardly find any cases laying down the test of separation or unseparation as we find under the Mitakshara.

Sons cannot
demand
partition
against
father's will.

Partition can only take place, as of right, between coparceners. In a Dayabhaga family with father at the head, the father, as we have already seen, * is the absolute owner of all ancestral and self-acquired property, and his sons or grandsons, have no control over his actions in reference to such property. The result is that sons or grandsons have no power to compel the father to effect a division of his property amongst them against his will. But, as in former times, wills were unknown, whenever a father in his old age wished to dispose of his property, he divided it among his sons, grandsons and other dependants in a way that pleased him most. Hence arose the practice for the father to effect a partition of his property among his descendants in his lifetime. Of course, upon his death, when the property descends under the rules of inheritance to his sons and grandsons in certain definite shares, it is open to these coparceners to effect a separation.

That sons have no co-ownership in their father's wealth is clear from paras. 14 and 18 of chap. I of the Dayabhaga. These paras are:—

Sons have no ownership in father's wealth.

14. "That is not correct: for it contradicts Manu and the rest. "After the death of the father and the mother, the brethren, being assembled, must divide equally the paternal estate: for they have not powers over it, while their parents live."

18. "Devala too expressly denies the right of sons in their father's wealth. "When the father is deceased, let the sons divide the father's wealth: for sons have not ownership while the father is alive and free from defect."

Lest from the use of the expression, "the brethren being assembled," one should infer the concurrence of all the coparceners necessary to effect a separation, Jimutvahana in para. 35 ch. I says:—"Since any one coparcener is proprietor of his own wealth, partition at the choice even of a single person is thence deducible."

Any one coparcener may seek partition.

Speaking of the periods of partition, the author in ch. I para. 38 says:—"Thus there are two periods of partition: one, when the father's property ceases; the other by his choice, while his right of property endures"; and, again, in para 50—"It is thus established by reasoning, as well as by positive law, that two periods exist for the partition of wealth appertaining to a father, whether acquired by himself or inherited from ancestors."

Two periods of partition.

Let us next see who the persons are who are entitled to share at a partition.

Who are the sharers.

When a partition is made of ancestral property in the father's lifetime according to his will, he may reserve a double share for himself—See ch. II para. 35, where the author quotes Brihaspati and Narada. He may reserve a double share even in his son's acquisition—ch. II para. 65. As regards his acquired property, he may reserve any

Father may retain double share.

Unequal
division by
father
allowable.

portion—see ch. II paras. 56 and 73. But it is not necessary to examine the provisions of the law in reference to a partition made by the father's will, either of his self-acquired or his ancestral property. Under the law, he has absolute power over both classes of property, and the injunctions against unequal division are mere moral precepts, (para. 85) which will not avail against any partition made by the father, under the principle of *factum valet* which we considered in one of the previous* Lectures.

Partition
after
father's
demise.
Among
heirs only.

At a partition made after the father's decease, the persons entitled to share are evidently the persons who under the law jointly inherited his property. Now, I presume you know that, the right of succession to property is founded on the competence to offer oblations at obsequies and that Manu in Book 9, Sloka 186 declares: "To three must libations of water be made, to three must libations of food be presented; the fourth in descent is the giver of these offerings; but the fifth has no concern with them." According to these rules, the heirs of a deceased are his sons, grandsons and great-grandsons simultaneously, where these exist; and under the term "sons" are included adopted sons and sons by women of different tribes. But besides these heirs, others, *e.g.*, the widow, the mother and the unmarried daughters have claims upon the estate of the deceased for maintenance, and the unmarried daughter a further claim for her marriage expenses. When, therefore, sons, grandsons and great-grandsons inherit together or exclusively, the mother and the other persons would have a claim upon them for maintenance only.* I have said above that the sons, grandsons and great-grandsons, where

Sons,
grandsons
and great-
grandsons.

Sons in-
clude
adopted
sons and
sons by
women of
different
tribes.

they exist, are the heirs of a man. You must take this as correct, subject to the qualification that they are not disqualified under the law to inherit.

But the sons &c., must not be disqualified.

Failing the above, other persons inherit, as the widow, the daughter, the daughter's sons, the father, the mother, the brothers, the nephews &c., each class of relations succeeding exclusively in the order in which they have been here named. In such contingencies, whenever more persons than one of the same class inherit, any of them may seek a partition. But in all these cases, the heirs are persons of the same class similarly related to the last owner, and they take the inheritance in equal shares. Thus, if there be three grandsons by two daughters *viz.*, one by one daughter and two by the other, the three grandsons would share equally *per capita* and not *per stirpes*. We may, therefore, dismiss such cases from our consideration and confine ourselves to the case of the simultaneous succession of sons, grandsons and great-grandsons—relations of different grades.

Other heirs who jointly inherit are similarly related and take *per capita*.

As regards the shares of the sons, grandsons and great-grandsons when they inherit together, Jimutvahana in ch. III sec. 1 para. 18 says:—"The rule of distribution among sons extends equally to them and to grandsons and great-grandsons in the male line. There is not here an order of succession following the order of proximity according to birth. For, those three persons, the son, grandson and great-grandson do not differ in regard to the presenting of two oblations at solemn obsequies, one which was incumbent on the ancestor to present, and the other which is to be tasted by his manes." The author supplements the above in para. 21 thus:—"If there be one son living, and sons of another son who is deceased, then one share appertains to the

Distribution among sons, grandsons and great-grandsons when all inherit simultaneously.

Texts.

surviving son, and the other share goes to the grandsons, however numerous. For, their interest in the wealth is founded on their relation by birth to their own father; and they have a right to just so much as he would have been entitled to." And again in para. 23 :—" If there be a numerous issue of one brother and few sons of another, then the allotment of shares is according to the fathers."

Cases.

That sons share equally the landed estate of their deceased father has been held from the earliest times.—Gudadhur Surma *v.* Ajodharam Chowdhree, 30th October 1794, S. D. A. Rep. Vol. I p. 6; Bhoyrub Chand Rai *v.* Russomonee, 18th Sept. 1799, S. D. A. Rep. Vol. I p. 27; Issur Chunder Carformah *v.* Gobind Chand Carformah, January 1823, MacCons of H. L. 74.

That grandsons inherit *per stirpes* and not *per capita* will appear from the following cases: Joynarain Mullick *v.* Bissumbhur Mullick, Aug. 1819, MacCons H. L. 48; Manjanatha Shanabhaga *v.* Narayana Shanabhaga, (1882) I. L. R. 5 Mad. 362.

Mother's share at partition among sons.

As regards the mother, the law under the Dayabhaga is that she is entitled to maintenance and that at a partition among her sons, if she received no property from her husband, she takes a share equal to the share of a son.

That she does not take except at a partition among her own sons appears from para. 29 sec. II ch. III, which provides :—" When partition is made by brothers of the whole blood after the demise of the father, an equal share must be given to the mother. For the text expresses "the mother should be made an equal sharer." On this point see Shib Chunder Bose *v.* Gooroo-prasād Bose, MacCons H. L.; Jodoonath Dey Sircar *v.* Brojonath Dey Sircar (1874) 12 B. L. R. 385; Cally Churn Mullick *v.* Janova Dossee 1 Ind. Jur.

N. S. 284; *Torit Bhoosun Bonnerjee v. Tara Prosonno Bonnerjee* (1879) I. L. R. 4 Cal. 756; *Jewmoney Dossee v. Attaram Ghose*, Mac.Cons. H. L. p. 64; *Hemangini Dasi v. Kedar Nath Kundu Chowdhry* (1889) I. L. R., 16 Cal., 758 (see p. 765) *Kristo Bhabiney Dossee v. Ashutosh Bosu Mullick* (1886) I. L. R., 13 Cal., 39.

From the above it follows, as a corollary, that when a mother has one son, she cannot demand a share, though her maintenance may be a charge on the ancestral property in his hands.—*Jewmoney Dossee v. Attaram Ghose* above referred to.

Step-mother can not claim from her step-sons.

That a step-mother cannot claim a share from her step-sons appears from para. 30 sec. II ch. III, *Dayabhaga* which says :—“ Since the term “mother” intends the natural parent it cannot also mean a step-mother. For, a word employed once cannot bear the literal and metaphorical senses at the same time.”

When the partition is made by the father, he is enjoined to allot to each of his childless wives a share equal to a son's. Thus ch. III sec. II para. 32 provides :—“ Wives of the father (meaning step-mothers) who have no male issue, not those who are mothers of sons, must be rendered equal sharers with the son.” So *Vyasa* ordains ‘Even childless wives of the father are pronounced equal sharers.’” But when the partition is made by her step-sons she is simply entitled to maintenance. On this point *Sricrishna* and *Achyuta* say :—“ A certain author supposes this (para. 32) to relate to partition made by sons because the father's wives, whether mothers of sons, or childless, take one share apiece at a distribution made by the father. But that is erroneous; for it is inconsistent with the remark that the word “mother” does not signify ‘step-mother.’ See also the case of *Gooroo Prosad Bose v. Shib*

When father makes partition, each of his childless wives entitled to share.

Maintenance of mother is charge on her sons' (not step-sons') share.

Chunder Bose (1820) MacCon's H. L. 69. In Sorolah¹ Dossee *v.* Bhoobun Mohun Neoghy (1888) I. L. R. 15 Cal. 292, the judges observed :*—"If there be two groups of sons by different mothers and those groups separate each from the other, the maintenance of the widow is a charge on her own sons' property not on her step-sons'. If her sons do partition, it has long been the settled law of Bengal that her share is taken out of their shares, not out of her step-sons'. And she has in no case a right herself to initiate a partition."

Mother's share when she has separate property.

That a mother, when she has received property from her husband, has, at a partition by her sons, to make allowance for such property from her share will appear from the following decisions: Jugomohun Haldar *v.* Saroda Moyee Dossee (1877) I. L. R. 3 Cal. 149; Jodoonath Dey Sircar *v.* Brojo Nath Dey Sircar (1874) 12 B. L. R. 385, where Justice Macpherson held that the expression "half" in para. 31 sec. II ch. III means such portion as may with what she has already received give her an equal share. Para. 31 runs in these words :—"The equal participation of the mother with the brethren takes effect if no separate property had been given to the woman. But if any have been given, she has half a share. And if the father make an equal partition among his sons, all the wives who have no issue must have equal shares with his sons * * * ." See Kishori Mohun Ghose *v.* Monimohun Ghose (1885) I. L. R. 12 Cal. 165.

Mode of determining mother's share at a division among her sons.

The extent of a mother's share depends upon the number of her own sons and the aggregate share of these sons. Thus, if A and B be the widows of a deceased father and A have 5 sons and B, three; the sons of A would be entitled together to

$\frac{5}{8}$ ths of the inheritance and the sons of B to the remaining $\frac{3}{8}$ ths. At a partition among the sons of A, A would be entitled to $\frac{1}{6}$ of $\frac{5}{8}$ ths share and B under similar circumstances to $\frac{1}{4}$ of $\frac{3}{8}$ ths share—*Hemangini Dasi v. Kedarnath Kundu Chowdhry* (1889) I. L. R. 16 Cal. 763; and *Kristo Bhabinay Dossee v. Ashutosh Bosu Mullick* (1886) I. L. R. 13 Cal. 39.

The paternal grandmother receives a share like the mother at a partition made by the father. Vyasa, quoted in *Dayabhaga* ch. III sec. II para. 32 says:—"Even childless wives of the father are pronounced equal sharers and so are all paternal grandmothers: they are declared equal to mothers." But whether she gets a share at any other partition is exceedingly doubtful on the authority of decided cases: see *Puddum Mookhee Dossee v. Rayee Monee Dossee* (1869) 12 W. R. 409; same case in *Review* 13 W. R. 66; *Sibbosoonderly Dabia v. Bussoomutty Dabia* (1881) I. L. R. 7 Cal. 191.

Paternal
grand-
mother's
share:

As to the right of an unmarried daughter to a share, the texts seem to conflict with each other. Some declare them entitled to a third of a son's share, while others enjoin that their brothers should allot sufficient funds for the celebration of their nuptials. Thus para. 34, sec. II, ch. III provides:—"Unmarried daughters, following the allotments of sons take a quarter thereof." Thus Brihaspati says—"mothers are equal sharers with them; and daughters are entitled to a fourth part." And similarly para. 35 provides. "A son has three parts and a daughter one." So *Catyayana* declares: "For the unmarried daughter, a quarter is allowed; and three parts belong to the son. But the right of the owner to exercise discretion is admitted when the property is small." So, again in para. 36: "If the funds be small, sons must give a fourth part to daughters deducting it out of

Unmarried
daughter.

their own respective shares." Thus Manu says : "To the maiden sisters, let their brothers give portions out of their own allotments respectively ; let each give a fourth part of his own distinct share : and they who refuse to give it shall be degraded." On the other hand, para. 37 provides : "Let each give." From the mention of giving and the denunciation of the penalty of degradation if they refuse, it appears that portions are not taken by daughters as having a title to the succession. For one brother does not give a portion out of his own allotment to another brother who has a right of inheritance." And again in para. 39 : "Thus since the daughter takes not in right of inheritance ; if the wealth be great funds sufficient for the nuptials should be allotted. It is not an indispensable rule that a fourth part shall be assigned."

Her share means funds sufficient for her nuptials.

Elsewhere will be found the observations of Professor Jolly on this point which I have* quoted at length. In *Damoodur Misser v. Senabuttu Misra* I. L. R. 8 Cal. 537, the High Court of Calcutta held that the brothers had only to provide for the nuptials of their sisters.

Who are disqualified to inherit.

They must be supported except the outcast.

As under the Mitakshara, so under the Daya-bhaga, certain persons are considered disqualified to inherit or to participate. In ch. V, para. 11 Jimutvahana quotes Devala : "When the father is dead as well as in his lifetime, an impotent man, a leper, a madman, an idiot, a blind man, an outcast, the offspring of an outcast and a person wearing the token of religious mendicancy are not competent to share the heritage. Food and raiment should be given to them excepting the outcast. But the sons of such persons being free from similar defects shall obtain their father's share of the in-

heritance. 'A person wearing the token of religious mendicity' is one who has become a 'religious wanderer or ascetic.' As to the disqualified, their childless wives must be supported for life, and their daughters must be maintained until married (see para. 19, ch. V, Dayabhaga).

Their childless wives and daughters.

As to a son born after partition, para. 10, ch. VII of the Dayabhaga provides:—"If property inherited from the grandfather as land or the like, had been divided, he may take a share of such property from his brothers: for, partition of it is authorized only when the mother becomes incapable of bearing more children. Consequently since the partition is illegal, having been made in other circumstances, it ought to be annulled."

After born brother.

If a coparcener is absent at the time of partition, he would be entitled to his due share on return. Dayabhaga ch. VIII.

Absent coparcener.

We have seen that in former days* males belonging to higher castes could marry females of the same or lower castes. Sons born of such marriages had various shares assigned to them. Jimutvahana treats of this subject in ch. IX. As such marriages are unknown in our days—the only circumstance that ought to be noted in this connection is the prohibition against division among any but sons by a Brahmini of what has been acquired by the father through acceptance of a pious donation—para. 17, ch. IX.

Sons by women of different tribes.

Brahmin's acquisitions by acceptance of pious donations not divisible except among sons by Brahmin wives.

When a natural son is born to a father after he has adopted a son, the natural and the adopted son share in the proportion of 2 to 1. See ch. X para. 7. From this it follows that if there are two natural sons, they would get 4 shares while the adopted son would get one.

Competition between a natural and an adopted son.

The Dayabhaga, in the same way as the Mitakshara, makes a distinction between brothers of

* Ante. pp. 46-47 and 333-335.

**Brothers of
whole blood
and half
blood.**

the whole-blood and half-blood. Where brothers of the whole and the half-blood are all re-united, the brothers of the whole-blood share the inheritance to the exclusion of those of the half-blood; so also where they are all separated. But where brothers of the half-blood are re-united, while those of the whole-blood are separate, all of them of both classes share equally. Of course, where uterine brothers are associated while the half-brothers are not so, the inheritance goes exclusively to the whole brothers. Jimitvahana says in para. 36, sec. V, ch. XI—"Among whole brothers if one be re-united after separation, the estate belongs to him. If an unassociated whole brother and re-united half-brother exist, it devolves on both of them. If there be only half-brothers, the property of the deceased must be assigned in the first instance to a re-united one; but if there be none such, then to the half-brother who is not re-united."

The same rule is affirmed in relation to associated and unassociated uncles in para. 39.

**Who may
re-unite.**

Whatever doubts may arise in reference to the relations who are competent to re-unite under the Mitakshara, the Dayabhaga is very clear in its provisions. Thus in para. 3, ch. XII re-united coparceners are described: "He who being once separated dwells again through affection with his father, brother or paternal uncle is termed "re-united," and para. 4 excludes all other relations. It says "A special association among persons other than the relations here enumerated is not to be acknowledged as a re-union of parceners; for the enumeration would be unmeaning."

Where several persons of the same class inherit together, as widows, daughters, nephews, uncles &c., they are equal sharers in the *corpus*, and a separation of their interests may be effected

in accordance with the procedure prescribed in the following Lectures.

The Madras Court in *Kathaperumal v. Venkabai* (1880) 1. L. R. 2 Mad. 194, held that there could be no compulsory partition, (though there could be one by arrangement), between two co-widows inheriting their husband's property together, and that the interest of one of the widows could not be alienated. But this ruling was dissented from in *Janokinath Mukhopadhyaya v. Mothuranath Mukhopadhyaya* (1883) 1. L. R. 9 Cal. 580 F. B.; 12 C. L. R. 215. See also *Bhugwandeem Doobey v. Myna Baee* 11 M. I. A. 487; 9 W.R., P.C. 23; *Sundar v. Parbati* (1889) 1. L. R. 12 All. 51; L.R., 16. I.A., 186; and *Gajapathi Nilamani v. Gajapathi Radhamani* (1877) 1. L. R. 1 Mad. 290; 1, C. L. R. 97; L. R. 4 I. A. 212.

Partition among co-widows.

So in the case of daughters, there may be a partition among them—*Padmamani Dasi v. Jagadamba Dasi* (1871) 6 B. L. R. 134. I have already* noticed that among co-widows as well as among daughters, the right of survivorship obtains, and that it is so strong that it is not destroyed by partition.

Among daughters.

Survivorship among co-widows and daughters.

Touching the question of the interest which a woman obtains over a share allotted to her at a partition, Justice Wilson in *Sorolah Dossee v. Bhuvan Mohun Neoghy* (1888) 1. L. R. 15 Cal. 292 says:—"The wife's interest in her husband's estate resolves itself into a right to maintenance except in the absence of lineal male heirs, in which case she takes the inheritance, and in two cases—one occurring in her husband's lifetime, the other after his death—in which she takes a share. * * *

* * * The conclusion which I draw from the Bengal authorities is, that a wife's interest in

Interest which a woman has in share allotted at partition to meet her maintenance.

her husband's estate given to her by marriage ceases upon the death of her husband leaving lineal heirs in the male line; that such heirs take the whole estate; and that the share which a mother takes on a partition among her sons she does not take from her husband, either by inheritance, or by way of survivorship in continuation of any pre-existing interest; but that she takes it from her sons in lieu of, or by way of provision for, that maintenance for which they and their estates are already bound. I think it follows as a necessary inference that, on her death that share does not descend as if she had inherited it from her husband, but goes back to her sons from whom she received it."

**Agreements
not to
separate.**

Agreements made between coparceners that they would never effect severance of their interests are binding on them, but such agreements to the effect that neither the coparceners nor their heirs should ever effect any partition are not binding on the heirs.—*Rajender Dutt v. Sham Chund Mitter* (1880) I. L. R. 6 Cal. 106. In *Ramlinga Khanapure v. Virupakshi Khanapure* (1883) I. L. R. 7 Bom. 538, it was held that an agreement between coparceners never to divide certain property was invalid under the Hindu law as tending to create a perpetuity.

**Mahomedan
Law of par-
tition.**

The Mahomedans have no personal law of their own for the separation of joint ownership. Among them, joint ownership is oftentimes the result of several persons—males and females—jointly inheriting the estate of a deceased relative. The heirs succeed to specific shares, as in the *Dayabhaga*, while the interest which the female heirs take is in no sense different from the interest of their male co-sharers. If, under these circumstances, any sharer in the *corpus* wishes to have some portion of the *corpus* meted out to him as representing his interest, he has to follow the procedure prescribed in the succeeding Lectures.

The Mahomedan Law of inheritance is not properly a portion of my subject. I shall not, therefore, consider the details of the law of inheritance, but shall simply indicate generally the shares of the several heirs when they inherit together so that you may determine how a partition is to be made in any particular case.

Mahomedan
law of in-
heritance.

The order of succession in the Shia sect is different from that in the Soonnee; but the fundamental doctrine which is quoted below is the same in both sects. The doctrine I refer to is:—"God hath thus commended you concerning your children. A male shall have as much as the share of two females; but if they be females only, and above two in number, they shall have two-third parts of what the deceased shall leave; and if there be but one she shall have the half; and the parents of the deceased shall have each of them a sixth part of what he shall leave, if he have a child; but if he have no child, and his parent be his heirs, then his mother shall have the third part, and if he have brethren, his mother shall have a sixth part after the legacies which he shall bequeath, and his debts be paid. Ye know not whether your parents or your children be of greater use unto you. Moreover you may claim half of what your wives shall leave, if they have no issue; but if they have issue, then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath and their debts be paid; they also shall have the fourth part of what ye shall leave in case ye have no issue; but if ye have issue, then they shall have the eighth part of what ye shall leave after the legacies which ye shall bequeath and your debts be paid.* And if a man or woman's substance be inherited by a distant relation and he or she have a brother or sister, each of them two shall have a sixth part of

the estate ; but if there be more than this number they shall be equal sharers in the third part, after payment of the legacies which shall be bequeathed, and the debts without prejudice to the heirs."

"They will consult thee for thy decision in certain cases: say unto them, God giveth you these determinations concerning the more remote degrees of kindred. If a man die without issue and have a sister, she shall have the half of what he shall leave, and he shall be heir to her, in case she have no issue ; but if there be two sisters, they shall have, between them, two third parts of what he shall leave ; and if there be several both brothers and sisters, a male shall have as much as the portion of two females " Koran, Chapter 4.

From the above you will see that not only do the children but the father, the mother, and the husband or wife simultaneously inherit in certain shares. There is no distinction between real and personal or between ancestral and acquired property. Females always get half the share of males similarly related when inheriting with them, and take with the same full proprietary right as males, so that the shares inherited by them devolve after *their* deaths on *their* heirs. A right of representation is unknown and illegitimate children inherit only from the mother and mother's kindred.

Interest
taken by
female
heirs.

Special law
as to wills.

I presume you also know that under the Mahomedan law no person can disinherit an heir at law and that a devise holds good only to the extent of a third of the entire property.

In any given case of partition among the Mahomedan heirs, the shares will have to be first determined according to the rules of inheritance and then partition effected according to the procedure laid down in the succeeding Lectures.

LECTURE XI.

The General Law of Partition of all classes of Joint Property except Revenue-paying estates.

Scope of the present Lecture—Jurisdiction of civil courts before the passing of Act IV of 1893.—Sale of whole or portion of joint property for purposes of partition before Act. IV of 1893—partition by the parties themselves—by reference to arbitrators—scope of s. 523, Act. XIV of 1882 and s. 21 of Act. I of 1877—partition by application to court for reference to arbitration (s. 506, XIV of 1882)—partition by Civil Court through commissioners named by parties—preliminary decree—reference to commissioners—Procedure in a contested partition suit—partition as between some of the co-sharers—who can sue—Persons who under the Mitakshara cannot demand partition cannot sue—Case of co-widows—case of daughters—who should be made defendants—qualification as to plaintiff—all who are interested in property should be made defendants—Some sharers may remain joint—partition of portion of joint properties—Form of the plaint in a partition suit—ss. 2 and 9 Act. IV of 1893—31 and 32 Vic. Cap. 40—Provisions of the Indian and the English Partition Acts compared—Issues in partition suits—Preliminary decree—s. 3 Act IV of 1893—circumstances in which joint-property ought to be sold instead of being partitioned—The order of the Court directing sale is appealable—ss. 6 and 7 of Act IV of 1893—ss. 4 and 5 of Act IV. of 1893—Court to watch the interest of parties under legal disabilities—Family dwelling-house—The Civil Court, and not the commissioners, is to carry out the provisions of Act IV of 1893 and to determine shares of co-sharers—The way in which partition is to be effected—Form of preliminary decree—commissioners for partition—expenses of the commission—power of commissioners (ss. 396-400, XIV of 1882)—Final decree—owelty—forms of report by commissioners and final decree—Equities arising in a partition suit—Waste by a co-sharer—Improvements made by one of the proprietors—Improvements must be made *bonafide*—Improvements extending over the whole estate—Estimation of compensation payable to the party making improvements—when a party is entitled to the benefit of his own improvements—past conduct and acquiescence of the other parties—who may act as commissioners—proceedings of the commissioners ought to be open—duties of the commissioners—ascertainment of the properties—Inspection of the properties—preparations of plans—detailed valuation—Employment of surveyors—mode of division—Family idol—family dwelling house—

Right of residence of a Hindu widow—Interests and rights of all the parties to be kept in view—proximity of separate property of a party—drawing lots—Right of way of persons not being parties to the partition proceedings—Easements of light and air—Custody of title deeds—Costs—payment of costs how enforced—No lien for commissioners' charges—Rights of a mortgagee from a co-sharer—Rights of a putnidar—partition by collector—collector to complete partition proceedings by delivery of possession—Exchange of mutual conveyances in Calcutta—Expenses of a partition suit in the original side of the High Court of Calcutta—Failure of title after partition.

Scope of
the present
Lecture.

Hitherto we have considered the personal law of the Hindus and Mahomedans for the partition of joint property. That law is applicable to determine the *shares* of the various individuals who jointly succeed to the estate of a deceased proprietor. The procedure according to which the actual separation of the shares has to be effected, or rather according to which specific portions of the joint property representing the different shares have to be allotted is laid down by statutes generally for all classes of property save and except the revenue-paying estates. In this Lecture, I intend to discuss those general rules of procedure, reserving the consideration of the rules for the partition of the revenue-paying estates for the following Lectures.

Jurisdiction
of Civil
Courts be-
fore the
passing of
Act IV of
1893.

The rules that we are now about to discuss are of general application throughout the whole of British India. Until recently, (*i.e.* the 19th March 1893 when Act IV of 1893 authorizing in certain cases the sale of the whole or a portion of the property sought to be partitioned was passed), the Civil Courts had no jurisdiction to cause a sale of any portion of the joint property but were obliged, however inconvenient the partition into small shares might be to the parties, to effect a separation by metes and bounds according to the provisions of the Civil Procedure Code. The result was that partition, in several instances, was

entirely destructive of the property. But since that year, the legislature has authorized the Courts in certain circumstances to cause a sale of the whole or a portion of the property under partition in the interests of the joint owners. We shall discuss the provisions of the Act at length presently. But before entering upon that discussion, let me state to you that previously to the passing of the Act, Civil Courts had for their guidance, only the provisions of sections 396-400 of the Civil Procedure Code. By this I do not intend to convey that as a matter of fact Courts did not exercise their discretion in partition suits so as to produce the least possible hardship to any sharer. On the contrary, the general words of sec. 396 para. 2 gave the commissions for partition and the Courts ample powers in the making of the allotments. It is also a fact that previous to Act IV of 1893 parties in their own interests did often cause sales of whole or portions of properties under partition rather than suffer the loss and inconvenience attendant on partition into small shares. Nor do I mean that there are at present any rules for the guidance of the Civil Courts in effecting an actual division besides those contained in the Civil Procedure Code. The new Act only provides for sale of the whole or a portion of the property under partition in certain contingencies.

Sale of whole or portion of joint property for purposes of partition, before Act IV of 1893.

In some cases, as in those of joint property under the Mitakshara, the partition proceedings may have to determine the extent of shares of the different owners before effecting an actual severance into distinct portions; while in other instances the shares are definitively known, and the object of the proceedings is merely to create several independent and exclusive estates out of one. But no partition proceedings would be complete without final severance.

**Partition by
the parties
themselves.**

Now, partition may be either voluntary or compulsory. When it is made voluntarily by the parties interested, they generally determine their respective shares and then make their own allotments among themselves. In cases where the shares are equal, they make the divisions as nearly equal as they can, and then either the owners according to their seniority make the selection, or when such selection is not allowed, they draw lots. And finally to create good titles to the separate portions they execute mutual conveyances or releases.

**By refer-
ence to
arbitrators.**

In other cases where the properties are small in extent and the parties do not apprehend long disputations over the valuations of the properties though they cannot agree among themselves as to the allotments, the owners refer to some arbitrators, who with such help as the parties give them, value the entire property to be divided, make the different allotments and publish an award. If the parties have no objection to the award, they cause it to be registered under Act III of 1877, sec. 17 cl. (i) and either file it in Court under the provisions of section 525 Civil Procedure Code, or execute mutual conveyances or releases in respect of the different divisions. If all the parties think the award bad, they take no action upon it. But, if some of the parties wish it to be enforced, they proceed under sec. 525 Civil Procedure Code. In all cases where the parties appoint arbitrators to make a partition, they generally execute written agreements for such purpose. If after the execution of a written agreement appointing arbitrators to effect a division, any of the parties has reason to apprehend that the agreement may not be carried out, . . he may apply to Court and file the agreement under the provisions of sec. 523 Civil Procedure Code.

In this connection allow me to note a distinction, pointed out by Mr. Justice Farran in *Adhibai v. Cursandas Nathu* (1886) I. L. R. 11 Bom. 199, between an actual submission to arbitration and a contract generally to refer a controversy to arbitration.

That learned judge said that in an actual submission it was necessary that the points in issue should be definitively submitted to named arbitrators, and that such cases were contemplated in section 523 Civil Procedure Code; while a general agreement to refer an existing or possible future dispute to arbitration fell within the purview of the last para. of sec. 21 Specific Relief Act I of 1877, and that in cases of such general agreement, the Court by refusing to entertain suits under the provisions of sec. 21 abovementioned, might compel the parties to have their differences settled by arbitration.

Scope of
s. 523, Act
XIV of 1882
and s 21 of
Act I of
1877.

The last para. of the section above alluded to runs in these words :—"And save as provided by the Code of Civil Procedure, no contract to refer a controversy to arbitration shall be specifically enforced; but if any person who has made such a contract and has refused to perform it, sues in respect of any subject which he has contracted to refer, the existence of such contract shall bar the suit."

Justice Farran says:—"The object of the section is to compel parties, who have agreed to refer a matter to arbitration, so to refer it before having recourse to a Court of law. Exception I to section 28 of the Contract Act IX of 1872 provided the remedy of a suit for specific performance for a limited class of contracts to refer to arbitration. That was opposed to the English authorities, which have decided that the Courts should not grant specific performance of

agreements to refer—Fry on Specific Performance p. 417. That portion of section 28 of the Contract Act IX of 1872 has, probably for that reason, been repealed and the section under consideration has provided a new means of compelling parties to agreements to refer to carry them out by an actual reference, namely, by placing them under a severe disability, if they refuse to do so. The mischief to be suppressed was the refusal of parties, who had *agreed to refer* disputes to arbitration, to carry out such engagements in *specie*. The object aimed at, was to induce parties to such agreements to have recourse to arbitration before proceeding by suit. In respect of an *actual submission* to arbitration there was no such mischief to be suppressed. Where a specific dispute had been referred to the arbitration of named arbitrators, the Civil Procedure Code (XIV of 1882) made ample provision for compelling the parties to the submission to abide by, and carry out, its terms, unless they could shew sufficient cause to the contrary: see section 523. The Privy Council have held that the parties to such a submission are not at liberty, unless for good cause, to withdraw from it before it is filed in Court—Pestonjee Nussurwanjee *v.* Manockjee.* That was a decision under Section 326 of Act VIII of 1859, but the provisions of the present Code are almost identical with it. If the withdrawal of a party from an *actual submission* to arbitration were a refusal to perform a contract to refer within the meaning of section 21 of the Specific Relief Act I of 1877, the result would be that a withdrawal, for good cause, from a submission would preclude the party so withdrawing from suing in respect of the same

matter; otherwise, it would be necessary to read into the Section, after the words "has refused to perform it," the words "unless for good cause shown;" but their Lordships intimated in the above case that a withdrawal from a submission to arbitration would be in many cases justifiable."

From the above it is clear that the law prevents a suit for partition when the parties have entered into an agreement to have the partition effected through *arbitrators named*, except when good cause is shown why the agreement should not be enforced.

Hitherto we have considered only two modes usually adopted by parties for effecting a partition of immovable properties by arrangement. In the third mode, some of the persons interested in the property file a plaint in the Court having jurisdiction, with a prayer that a division of the property specified may be effected, and sometimes also with a further prayer to have accounts taken of the profits of the property in the hands of the defendants. We have in Lecture VII.* seen how such a suit should be valued for purposes of determining the jurisdiction of the Court in which the plaint should be presented. As regards the question of territorial jurisdiction, that is determined with reference to the provisions of Secs. 16 and 19 of the Civil Procedure Code. Then, when the defendants appear in the suit, all the parties—the plaintiffs as well as the defendants—in pursuance of their agreement apply to the Court under the provisions of Sec. 506 of the Civil Procedure Code that the matters in difference between them be referred to arbitration. The Court in compliance with the prayer of the parties refers the

Partition by application to court for reference to arbitration (S 506, Act XIV of 1882.)

Partition by Civil Court through commissioners named by parties.

matter, in dispute, to the arbitrators named by the parties, and thereupon the procedure prescribed in Chapter XXXVII of the Civil Procedure Code is followed. You should note that these arbitrators are not the commissioners for partition contemplated in Sec. 396.

**Preliminary
decree.**

In the fourth mode the plaint is filed as in the previous case. The defendants then file their written statements and the court after recording such evidence as the parties choose to adduce, makes a decree preliminary to the actual division by metes and bounds. Such a decree, it is true, is not expressly provided for in the Civil Procedure Code, but the provisions of Section 396 para. 1, hint at it. That para. runs thus: "In any suit in which the partition of immovable property not paying revenue to Government appears to the Court to be necessary, the Court after ascertaining the several parties interested in such property and their several rights therein may issue a commission to such persons as it thinks fit to make a partition according to such rights." The Court must see, before proceeding to actually divide the properties, that the plaintiff has any share in the same. How can it say who the persons interested and what their respective rights are, without making a preliminary decree? To the same effect are the observations of Justice Pontifex in *Gyan Chunder Sen v. Durga Churn Sen* (1881) I. L. R. 7 Cal. 318.; 8 C. L. R. 415. That learned judge says:—"We think it obvious, that what was intended by that section was, that upon the first hearing of the suit, the Court shall determine whether the plaintiff is entitled to a partition, and shall ascertain who the several persons interested in the property are, and shall direct by a preliminary decree or order that commissioners be appointed to make the partition."

Now, in the fourth mode which we have been considering, the parties, after the preliminary decree has been made, apply to the Court to appoint persons named by them to be commissioners under the provisions of Sec. 396, Civil Procedure Code. The Court, unless it sees any reasons to the contrary, generally appoints the persons, so named, to act as Commissioners, and on receipt of their reports, makes such decree as it thinks fit. The Commissioners named by the parties have to follow the procedure prescribed by the Civil Procedure Code and to act under instructions from the Court.

Reference to commissioners named.

I shall now consider the procedure to be followed in a contested suit for partition where the parties disagree not only as to their respective shares, but also as to the valuations of some of the properties sought to be partitioned, and as to whether any of the properties ought to be sold or divided.

Procedure in a contested partition suit.

We have seen in Lecture VII* that, according to the view taken by the Calcutta High Court, a decree in a partition suit has the effect of assigning a specific portion to each of the shareholders corresponding to his share in the *corpus*, and that the Bombay and the Allahabad High Court think that although distinct portions may be assigned to the several shareholders when asked for, there may be partition suits in which the Court may simply carve out the plaintiff's portion leaving the rest entire.

Partition as between some of the co-sharers

We have in a previous Lecture † seen who the persons are who can demand a partition of Mitakshara coparcenary property. Any one of these persons may be the plaintiff in a partition suit, but not any of the others, who, though they

Who can sue.

* Ante pp. 270-272.

† Ante pp. 45-47.

Persons
who under
the Mita-
kshara can-
not demand
partition
cannot sue.

Case of co-
widows.

Case of
daughters.

Who should
be made
defendants.

may be entitled to share when a partition is actually made, have no right under the Mitakshara to demand a partition. In the same way, a mother, or a grandmother, who under the Dayabhaga would be entitled to a share on partition among her sons or grandsons, would have no right to sue for partition. But except in these instances, every sharer in any joint property would be entitled to sue for partition. That there may be partition among co-widows would appear from *Bhugwandeen Doobey v. Myna Baee* (1868) 11 M. I. A. p. 487 and *Sundar v. Parbati* (1889) L. R. 16 I. A. 186; 1 L. R. 12 All. 51. Similarly there may be partition among daughters: *Padmamani Dasi v. Jagadamba Dasi* (1871) 6 B.L.R. 134.

All parties interested in the property to be partitioned and who would be entitled to share, save those who are plaintiffs, should be made defendants. Thus in *Pahaladh Singh v. Luchmunbutty* (1869) 12 W. R. 256, it was held that a suit for partition cannot be properly dealt with unless all who are admittedly shareholders in the joint property are before the Court. The principle laid down in this case was followed in *Kali Kanta Surma v. Gouri Prosad Surma* (1890) I.L.R. 17 Cal. 906.

In the case of *Torit Bhoosun Bonnerjee v. Tara Prosonno Bonnerjee* (1879) I. L. R. 4 Cal. 756; 4 C. L. R. 161, it was held that to a partition between half-brothers after the death of their father, the mother must be made party. But as a mother would not be entitled to share except at a partition among her own sons, she need not be made a party if her sons jointly take a share at the partition.

In *Sadu Bin Raghu v. Rambin Govind* (1892) I. L. R. 16 Bom. 608, it was held that a mortgagee

or purchaser should be made a party. Mr. Clark D. Knapp in his *Treatise on Partition*, Ed. of 1887, p. 103 says:—"A decree for partition cannot be made, unless all persons interested in the premises are made parties to the suit: and the party applying for a partition of lands must not only have a present estate in the premises of which partition is sought, as a joint tenant or tenant in common, but he must also be actually or constructively in the possession of his undivided share or interest in such premises. Because, if there is adverse possession, valid and succeeding, the only proper course for the Court to pursue is to dismiss the bill as having been prematurely filed." Mr. Freeman in his work on "*Co-tenancy and Partition*," 2nd Ed., § 463 says:—"It is a general principle of law that a litigation can never result in an adjudication which will be binding upon others than the parties to the suit, and their privies in blood or in estate. To this general rule proceedings in *rem* form no exception, for in those proceedings the subject of the litigation is itself a party and being itself bound by the result, all interests in it must be likewise bound. A suit for partition is sometimes spoken of as a proceeding in *rem*; but ordinarily it is not such a proceeding, for the process is not served upon the land nor is the land a party defendant, nor is the final judgment binding on any of the co-tenants who were not brought within the jurisdiction of the Court by some service of process, actual or constructive. It is, therefore, indispensable that all the co-tenants not uniting in the petition be made parties defendant." But though all the persons interested should be parties to a suit for partition, it is not necessary that the partition proceedings should carve out the share of each of the sharers. Mr. Freeman in § 508 of his work on "*Co-te-*

Qualification
as to plain-
tiff.

All who are
interested
in property
should be
made
defendants.

Some
sharers may
remain
joint.

nancy and Partition" says:—"Two or more co-tenants may unite in a petition for partition, and have their moieties set off to them, to be by them enjoyed together and undivided. The plaintiff in partition is entitled to have his share set off, if the premises are capable of being divided, for that is his object in instituting the proceedings: but if the situation of the defendants is such as to render it for their interest to retain their proportion together and undivided, there can be no possible objection, in principle, in permitting it to be done, nor is it incompatible with the spirit and intent of the act."

Partition of
portion of
joint prop-
erties.

Let us now see whether a plaintiff can seek partition of a portion only of *ijmalee* (joint) properties. This question was considered in Lecture IX as bearing on the Mitakshara law.* I shall now consider it generally. In *Hari Das Sanyal v. Pran Nath Sanyal* (1886) I. L. R. 12 Cal. 566, plaintiff prayed for partition of one of several *ijmalee Khanabaries*. Defendants objected to the partial partition. The High Court allowed the objection.

In *Venkatarama v. Meera Labai* (1889) I. L. R. 13 Mad. 275, it was held that the purchaser of a Mitakshara member's undivided interest in a portion of the family-property could not seek partition of that portion only, but his remedy was to cause the member whose right he had purchased to seek partition of the whole family-property. Indeed, under the Mitakshara, according to which no member has any property before partition, any other result would be out of question. In *Chandu v. Kushamed* (1891) I. L. R. 14 Mad. 324 under similar circumstances as in the above case, but in a Mahomedan family, the suit for partial partition was maintained: (1) because the vendor had a

definite share, and (2) because the purchaser had no interest in any of the other *ijmalee* properties of the family. The same principle would hold under the Dayabhaga.

In *Punchanun Mullick v. Shib Chander Mullick* (1887) I. L. R. 14 Cal. 835, Justice Trevelyan held that in a suit for partition of *ijmalee* property where the defendant stated that there were other properties, such properties should be included in the suit; but that if the territorial jurisdiction of the Court would not permit the inclusion of the additional properties, the original claim should proceed. In *Harinarayan Brahme v. Ganpat Rav Daji* (1883) I. L. R. 7 Bom. 272, it was held that where the plaintiff himself was in possession of some *ijmalee* properties, he could not sue for partition of other properties only.

The result of the authorities seems to be that no suit for partial partition ought to be thrown out if the defendant does not object to it, and on the other hand no suit for partial partition ought to be maintained if the defendant opposes it and it should appear that the plaintiff is in exclusive possession of other *ijmalee* properties which have not been included in the plaint. If in any case it should appear that the plaintiff is not in exclusive possession of any *ijmalee* properties, he may sue for partition of such portion thereof as lies within the local jurisdiction of a particular Court.

We have up to this time seen who the necessary parties to a suit for partition are, what are the properties to be included in the suit, how such suits should be valued and in what Courts the suits should be filed. Let us now determine upon the form of the plaint.

The Civil Procedure Code does not give us any particular instructions as to such plaints, and the schedule to the Code which contains draft forms

Form of the
plaint in a
partition
suit.

for several classes of suits does not contain a form which might be used in partition suits. At the end of this Lecture will be found some forms which may help you in drawing up plaints in such suits.

Referring to the forms appended to this Lecture you will find that in each of them a prayer, in the alternative, for sale of the entire property under partition, or a portion thereof, has been made. In each case it will be for the plaintiff, regard being had to the provisions of Secs. 2 & 9 of Act IV of 1893, to consider whether a prayer to this effect ought to be inserted in the plaint, for very important consequences are attached to the insertion of such a prayer. This leads me to consider the provisions of Act IV of 1893. The important portions of the Act bearing on the present question are Sections 2 and 9. Those sections are :—

Secs 2 &
9, Act IV of
1893.

2. "Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and distribution of the proceeds."

9. "In any suit for partition the Court may, if it shall think fit, make a decree for a partition of part of the property to which the suit relates and a sale of the remainder under this Act."

From the above, it is clear that before a Court

in a partition suit may assume jurisdiction to consider whether a sale of the property or of a portion thereof would be more beneficial to all the owners than a partition of the same among them, it must be moved so to consider, by the owners holding at least a half share in the property. If, therefore, the plaintiff in a partition suit does not consider it advantageous to him that the property should be sold, he should not insert in his plaint the prayer for sale.

While considering the provisions of Sec. 2, it will not be out of place to point out the difference between this section and the corresponding Section 4 of the English Partition Act of 1868 (31 & 32 Victoria Cap. 40). The English Act provides:—"In a suit for partition where, if this Act had not been passed a decree for partition might have been made, there if the party or parties, interested individually or collectively to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly and give all necessary or proper consequential directions."

31 & 32
Vict. Cap.
40.

You must have marked, as I read the section, that under the English Act whenever an application for sale is made by owners interested individually or collectively to a moiety or more, the Court is bound to sell, unless the other owners show that a partition would be more advantageous than a sale. By the English Act a larger discretion is given to the Court to sell than by the Indian Act. Thus, Section 3 of the English Act provides:—"In a suit for partition

Provisions
of the
Indian and
the English
Partition
Acts com-
pared.

where, if this Act had not been passed, a decree for partition might have been made, there if it appears to the Court that by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the Court may, if it think fit, on the request of any of the parties interested and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and give all necessary and proper consequential directions." According to this section, any one of the co-sharers may move the Court, and if the Court in the exercise of its discretion think a sale more advantageous than a partition, it may cause a sale to take place. There is no such provision in Act IV of 1893.

The Indian Act provides for sale of a portion of the property under partition (Sec. 9). This is a very salutary provision. You will observe that the Act enjoins that the sale of a portion has to be made "under the Act." By these last words you will understand that the conditions provided for in Sec. 2 and under which only, a sale of the property under partition can take place, must exist in the case of a sale of a part also.

After the plaint has been filed, summons will be issued to, and served on, the defendants under the Civil Procedure Code, and it will be time then for the defendants to appear and file their written statements. They may admit or deny the plaintiff's claim to the partition as laid in the plaint, or while admitting his claim to a partition, they may deny that he is in actual or constructive possession of

the share claimed in the plaint; they may pray for a division of the whole or a sale thereof; they may ask for the sale of a portion and division of the rest; they may admit or deny the plaintiff's valuation, and they may raise other objections.

If upon the plaint or any of the written statements, it does not appear whether the plaintiff or the defendant wishes a sale of the property under partition or of a portion thereof, the Court may ascertain the fact by an examination of the parties.

Upon the pleadings as above stated, issues will, in the ordinary course of things, be framed and the parties called upon to adduce evidence. The issues at this stage of the case will ordinarily be (1) whether the plaintiff is entitled to a partition, (2) who are the other parties entitled to the property, (3) what are the shares of all the several owners, and (4) when co-sharers owning at least a moiety of the property under partition wish for a sale of the whole or a portion, whether a sale or a partition would be more beneficial to all the shareholders. If upon the trial of the first issue it should appear that the plaintiff has no right to partition, the suit should be dismissed. Otherwise the other issues should also be tried and a preliminary decree made recording a finding on each of the above issues*. We have observed that some of the shareholders may wish to have their shares intact though separated from other shares. In such cases, in deciding the third issue the Court need not find the extent of the separate shares of such of the owners as do not wish separation among themselves. On the fourth of the above issues, the Court would have to ascertain from the shareholders other than those who have prayed for sale, if they or any of them are willing to purchase, under

Issues in
partition
suits.

* Ante p. 371.

the provisions of Sec. 3 of Act IV of 1893, the shares of those who have applied for sale at a valuation to be made by the Court. Now the provisions of Sec. 3 are these:—

Sec. 3, Act
IV of 1893.

3. “(1) If, in any case in which, the court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at the price so ascertained, and may give all necessary and proper directions in that behalf.

“(2) If two or more shareholders severally apply for leave to buy as provided in subsection (1), the Court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the Court.

“(3) If no such shareholder is willing to buy such share or shares at the price so ascertained the applicant or applicants shall be liable to pay all costs of or incident to the application or applications.”

You will observe that if any of the shareholders, interested individually or collectively to a moiety or upwards, apply for sale under Sec. 2 and any of the other shareholders offer to purchase such share or shares under Sec. 3, it would not be necessary for the Court, at that stage, (though it may be necessary afterwards) to find whether a sale or partition would be more beneficial to the parties. The law (Sec. 3) says the Court *shall* offer to sell, &c. In such a case, therefore, *i.e.*, where any shareholder would express the desire to purchase, the Court would have to make a valuation of the share or shares of the applicants for sale, and offer to sell the same at the price ascertained. Should the shareholder or shareholders,

who expressed a desire to purchase before the valuation was made, decline to effect the purchase after the Court has made the valuation, the provisions of clause 3 Sec. 3 would come into operation, and in that event it would be necessary for the Court to see whether a sale or partition would be more beneficial. In order to determine this question, the Court may have to take into consideration various circumstances. Thus, where the number of sharers is very large and the property small, it may have to find whether a division into small plots would not be destructive of the property. So also, in the partition of a dwelling house where it may be necessary to demolish portions of the existing buildings in order to allow passage to the partitioned plots in the interior, the Court may have to determine whether, in the interests of all parties, the demolition of a portion would be more advantageous than a sale. If upon the adjudication of the fourth issue, the Court should come to the conclusion that the whole of the property under partition or a portion thereof should be sold in the interests of all the shareholders, the Court ought to make an order to that effect. Such order under Sec. 8 would be deemed to be a decree and would be appealable under the provisions of Sec. 540 Civil Procedure Code.* We have seen that under cl. (3) Sec. 3 the applicants for sale have to pay all costs of advertising and conducting the sale. The Court, upon deposit being made of such costs, would hold the sale under the provisions of Secs. 6 and 7 of the Act. Those sections provide:—

6. “(1) Every sale under Sec. 2 shall be subject to a reserved bidding, and the amount of such bidding shall be fixed by the Court in such man-

Circumstances in which joint property ought to be sold instead of being partitioned.

The order of the Court directing sale is appealable.

Ss. 6 and 7 of Act IV of 1893.

* On this point see *Dulhin Golab Koer v. Radha Dulari Koer* (1892) 1. L. R., 19 Cal., 463.

ner as it may think fit and may be varied from time to time.'

"(2) On any such sale any of the shareholders shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purchase-money or any part thereof instead of paying the same as to the Court may seem reasonable.

"(3) If two or more persons, of whom one is a shareholder in the property, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the shareholder.

7. "Save as hereinbefore provided, when any property is directed to be sold under this Act, the following procedure shall, as far as practicable, be adopted, namely :—

"(a) if the property be sold under a decree or order of the High Court of Calcutta, Madras or Bombay in the exercise of its original jurisdiction, or of the Court of the Recorder of Rangoon, the procedure of such Court in its original Civil jurisdiction for the sale of property by the Registrar ;

"(b) if the property be sold under a decree or order of any other Court, such procedure as the High Court may from time to time by rules prescribe in this behalf, and until such rules are made the procedure prescribed in the Code of Civil Procedure in respect of sales in execution of decrees."

None of the High Courts, as I understand, have prescribed any rules of procedure for the sale of properties under Act IV of 1893. After the sale, the proceeds have to be divided by the Court rateably among the shareholders. I have discussed the principal provisions of the Partition Act of 1893. It remains for me to

notice only the provisions of Secs. 4 and 5. They run in these words:—

“4. (1) Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit, and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.”

**Ss. 4 and 5,
Act IV of
1893.**

“(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.”

“5. In any suit for partition a request for sale may be made or an undertaking, or application for leave, to buy may be given or made on behalf of any party under disability by any person authorized to act on behalf of such party in such suit, but the Court shall not be bound to comply with any such request, undertaking or application unless it is of opinion that the sale or purchase will be for the benefit of the party under such disability.”

**Court to
watch the
interest of
parties under
legal
disabilities.**

As regards Sec. 5, I presume, you know that an infant or any other person under a legal disability can only sue through a next friend and be sued through a guardian *ad litem*. I have already observed that an* infant can sue for partition, only on proof of malversation, and that a Court before allowing a suit for partition to proceed on behalf of a minor has to satisfy itself that the partition would be beneficial to the minor. Notwithstanding

* Ante p. 185.

ing the appointment of a next friend or a guardian *ad litem*, the Court has to satisfy itself that the interests of the minor or other person under legal disability are not sacrificed by any compromise. And accordingly Section 462 of the Civil Procedure Code provides: "No next friend or guardian for the suit shall without the leave of the Court enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend or guardian. Any such agreement or compromise, entered into without the leave of the Court, shall be voidable against all parties other than the minor."

Knapp in his work on Partition p. 120 says:—"The fact that one of the parties interested in the partition of an estate is an infant, or a lunatic, or an habitual drunkard, will not deprive other parties in such interest of their right to a partition and sale of the premises so held in common by them. But before the interest of the infant or lunatic, or habitual drunkard can be disposed of and his title vested in a purchaser, he must in some proper form, be brought before the Court and his rights passed upon and protected." Now you know that the law protects the person and the property of every minor, and Section 5 only adopts the ordinary practice and accentuates it. A request for sale or an application for leave to buy are *extraordinary* proceedings in the conduct or defence of a suit, and the law requires the Court to certify to the reasonableness of the request or the application. You should also observe that the law allows a minor on attaining majority to sue to set aside a partition on proof of fraud: see *Chanvirapa v. Danava* (1894) I. L. R. 19 Bom. 593.

Family
dwelling
house.

As regards Section 4, you know how inconvenient it is for the members of an undivided family

to have a stranger among them as a co-sharer in their dwelling house to which they cling to the last. The stranger, on the other hand, cannot enjoy his purchased share without a partition. The law protects the rights of both parties by giving to the stranger the value of his purchased property, and by keeping the family in the possession of their dwelling house.

You should note in this connection that whatever may be the extent of the share of the purchaser, the members would have a right to compel him to sell it to them.

I have now considered all the provisions of the Partition Act of 1893. You will notice that the Civil Court (and not the Commissioners for Partition) has to carry out the provisions of the Act. You should note that under the Indian Acts, a Court cannot make a reference to Commissioners (except when the parties apply for the same) to ascertain the shares of the parties, or to find upon the comparative advantages of a sale and partition, but the Court has to come to its own findings on these questions.

The Civil Courts and not the Commissioners to carry out the provisions of Act IV of 1893 and to determine the shares of co-sharers.

Hitherto we have considered how the power of sale conferred on Courts should be exercised. Let us now see how a partition should be effected, either of the whole property in suit or of such portion as may remain to be partitioned after the sale of the rest.

The way in which partition is to be effected.

We have seen that the Court has to make a preliminary decree determining the shares of the several parties.

In the schedule to this Lecture at the end will be found a form of such a preliminary decree.

Form of preliminary decree.

By the preliminary decree, a reference is made to a number of persons (generally three) called Commissioners for Partition. Though the practice is to appoint generally more than one Com-

Commissioners for partition.

Expenses of
the Com-
mission.

Powers of
Commis-
sioners (Ss.
396-400,
Act XIV of
1892).

Final
decree.

missioner, the High Court of Calcutta in *Gyan Chunder Sen v. Durga Churn Sen* (1881) I. L. R. 7 Cal. 318; 8 C. L. R. 415, has held that the Court is not bound to appoint more than one Commissioner. But before issuing the Commission, the Court makes the party, on whose application the Commission is issued, pay* into Court a reasonable amount for the expenses of the Commission. The preliminary decree, or the reference, which is then issued to the Commissioners gives them full directions as to how the partition is to be made; and the Commissioners in making the division into parcels and awarding compensation for *unavoidable* inequalities have to follow their directions strictly. The only powers which the Code of Civil Procedure gives to the Commissioners, independently of the instructions of the Court, are that any one of them, unless otherwise directed by the Court, may examine the parties themselves and any witnesses whom they may produce or whom he may think necessary to examine,† and may also call for and examine documents and other things relevant to the enquiry, and at any reasonable time enter upon or into any land or buildings directed to be partitioned. The Commissioners, after making the enquiry and division, submit to the Court which issued the Commission one or more reports according as they agree or disagree. The Court, on receipt of the report or reports of the Commissioners, calls upon the parties to attend, and after hearing their objections, if any, either quashes the reports and issues a new Commission, or where the Commissioners agree in their report and no objections against it are substantiated, passes a decree in accordance with such report. This decree is

* Sec. 397 Civil Procedure Code.

† Sec. 398 Civil Procedure Code.

called the final* decree in a partition suit. In this connection, see the observations of Justice Ghose in *Dwarka Nath Misser v. Rabinda Nath Misser* (1895) I. L. R. 22 Cal. 425.

The above is a summary of the provisions of Secs. 396 to 400 of the Code of Civil Procedure. These sections have been printed in extenso in the Appendix at the end of the Lectures.

You will note that sums directed to be paid for the purpose of equalizing the values of the shares under the second para. of Sec. 396 are in legal language called "Owelty." The Commissioners have no authority without† express authorization by the Court to award this compensation.

Owelty.

I have in the Schedule at the end of this Lecture given a form of Report by Commissioners for Partition, and also a form of final decree. These forms will help you in understanding the duties of the Commissioners and the directions that have generally to be given in a final decree.

Forms of report by Commissioners and final decree.

Our Courts in this country are Courts of law and equity. They may, therefore, in a suit for partition be called upon to adjust all the equities existing between the parties and arising out of their relation to the property to be divided.* But these equities are so vast and complicated in their nature that an exhaustive consideration of them is impossible in the course of a Lecture. I shall, therefore, refer to some of the leading principles that ordinarily arise in a suit for partition. It is one of the first principles of equity that "he who seeks equity must do equity." Hence whoever by a suit for partition invokes the jurisdiction of a Court of equity in his behalf thereby submits himself to the same jurisdiction, and concedes its authority to compel him to deal equitably with his co-sharers.

Equities arising in a partition suit.

* Para. 2 sec. 396 Civil Procedure Code.

† Sec. 396 Civil Procedure Code.

Waste by
co-sharer.

Thus, "if one of the co-tenants has wasted any part of the lands of the co-tenancy, the Court may take that fact into consideration, and do justice between the parties by assigning to the wrong-doer the part which he has wasted"—Freeman § 506.

Improvements made
by one of
the co-tenants.

As to improvements made on a portion of joint lands by one of several proprietors, Mr. Freeman says* :—"The fact that a co-tenant has located upon a particular portion of the lands of the co-tenancy and has enhanced its value by making improvements, or by reducing it from a wild state to one fit for profitable cultivation, is a circumstance always deemed worthy of the attention of a Court charged with the duty of making a partition. Such improvements are generally indispensable to a profitable and comfortable enjoyment of the property, and contribute to the general prosperity of the community. The law declines to compel one co-tenant to pay for improvements made without his authorization; but it will not, if it can avoid so inequitable a result, enable a co-tenant to take advantage of the improvements for which he has contributed nothing. When the common lands come to be divided, an opportunity is offered to give the co-tenant who has enhanced the value of a parcel of the premises, the fruits of his expenditures and industry, by allotting to him the parcel so enhanced in value, or as much thereof as represents his share of the whole tract. 'It is the duty of equity to cause these improvements to be assigned to their respective owners, (whose labour and money have been such inseparably fixed on the land) so far as can be done consistently with an equitable partition.' " But when the property is not susceptible of such a division, the more doubtful question arises: whether compensation

ought to be awarded to the co-tenant who has made the improvements. Mr. Freeman on this point extracts the following rule from decided cases :—" Where* one tenant in common lays out money in improvements on the estate, although the money so paid does not, in strictness, constitute a lien on the estate, yet a Court of equity will not grant a partition without first directing an account and a suitable compensation. To entitle the tenant in common to an allowance on a partition in equity, for the improvements made on the premises, it does not appear to be necessary for him to show the assent of his co-tenants to such improvements, or a promise, on their part, to contribute their share of the expense ; nor is it necessary for them to show a previous request to join in the improvements, and their refusal." " The only good faith required in such improvements is that they should be made honestly for the purpose of improving the property, and not for embarrassing his co-tenants or encumbering their estate, or hindering partition." But " if one joint tenant, or tenant in common, covers the whole of the estate with valuable improvements, so that it is impossible for his co-tenant to obtain his share of the estate without including a part of the improvements so made, the tenant making the improvements would not be entitled to compensation therefor, notwithstanding they may have added greatly to the value of the land ; because it would be the improver's own folly to extend his own improvements over the whole estate, and because it would be unjust to permit a co-tenant, at his pleasure, to charge another co-tenant with improvements he may not have desired. In such a case, the im-

Improve-
ments must
be made
bona fide.

Improve-
ments ex-
tending
over the
whole
estate.

Estimate of compensation payable to the party making improvements.

prover stands as a mere volunteer, and cannot, without the consent of his co-tenant, lay the foundation for charging him with improvements." As the allowance of compensation for improvements is, in all cases, made, not as a matter of legal right, but purely from the desire of the Court to do justice, the compensation will be estimated so as to inflict no injury on the co-tenant against whom the improvements are charged. He will therefore be charged, not with the price of the improvements, but only with his proportion of the amount which at the time of the partition they add to the value of the premises. From this amount he will also be entitled to deduct any sum to which he may have a just claim for use and occupation of his moiety enjoyed by the co-tenant making the improvements."

When a party is entitled to the benefit of his own improvements.

Past conduct and acquiescence of the other party.

In order to determine whether at a partition, a party would be entitled to the benefit of his own improvements, the past conduct of the joint owners would oftentimes be a considerable help. Mr. Knapp in his work on Partition p. 226 says; "The doctrine of acquiescence in what has been done, or what is to be done is well recognized in law as the admission of a party. The Commissioners in making their division and allotment are to take into consideration the acquiescence of the parties in what has been done relative to the premises, and to the improvement of such premises in the past, and, also, to take into consideration such admissions or agreements as have been made in relation to the division of the property or improvement of the property in the future. As for instance, it may have been agreed upon by all the parties in interest that some one of the co-tenants shall have, in case of future division, set apart to him a certain parcel of land, and he, by reason of such

agreement on the part of his fellow co-tenant, has taken possession of the same, has built upon it, or set fruit-trees upon the land, thus having an equitable interest in such particular parcel so improved by him, greater than his interest therein as a co-tenant, and it being an interest that should be considered by the Commissioners in making their allotment; and the admission of the other co-tenants, or their acquiescence in the acts of the co-tenant thus improving such parcel, should estop all who are interested having thus acquiesced, in claiming, upon a division and allotment of the land, that the co-tenant thus improving said particular parcel should not be allowed the benefit of the acquiescence, admission or agreement of his fellow co-tenants. Such acquiescence, to have effect, must be some act of the mind and amount to voluntary demeanour, or conduct of the party as it may be an acquiescence in conduct as well as acquiescence in language. Such conduct or language must be fully understood by the party, claiming benefit under it, before an inference can be drawn from the passiveness or silence of the opposite party."

Mr. Robert Belchambers, in his compilation entitled "Practice of the Civil Courts," has embodied a large number of rules of practice in suits for partition, and you will do well to refer to them.

It has been held that only indifferent persons can be Commissioners. An advocate or attorney, concerned in the cause, or, a person related to any of the parties cannot be a Commissioner. Nor can a person be a Commissioner who is nearly allied to any of the parties, or to whom any apparent cause of partiality can be imputed; as a master, a servant, a partner or a debtor.—*Moslyn v. Spencer*, 6 Beav. 135; *Sayer v. Wagstaff* 5 Beav.

Who may
act as
com-
mis-
sioners.

462. The objection to an attorney applies also to his clerk.—*Newton v. Foot*, 2 Dick. 792; 2 Ch. R. 393; *Cooke v. Wilson* 4 Madd. 380.

It is desirable that only persons acquainted with the ordinary procedure and qualified to act should be appointed Commissioners.—*Seton* 1st Edition 197, Lord Redesdale's opinion in *Curzon v. Lyster*.

When the Court appoints Commissioners named by the parties, their award is less liable to be disturbed than that of Commissioners appointed by the Court of its own accord.—*Manners v. Charlesworth* 1 Myl. and K. 332.

The proceedings of Commissioners are in their character judicial or quasi-judicial, and ought to be open.—*Seton* 1st Edition 192, 193.

Let us now consider the duties of the Commissioners according to decided cases.

The first duty of the Commissioners is to ascertain the properties to be divided. This should be done, as far as possible, from the pleadings. Evidence should only be taken if the properties or any of them are not mentioned, or fully or accurately described in the pleadings, or, if there is any intermixture of boundaries between the properties to be divided and other properties. Except on questions of boundary, evidence as to other properties would be irrelevant and ought to be rejected.—Lord Redesdale's opinion, *Seton* 1st edition 194; *Manners v. Charlesworth* Myl. and K. 335.

It is sometimes useful to invite a mutual production and exchange of descriptions of the properties, and then, if the parties can agree, to invite a like production and exchange of valuations of the properties and proposals for division.

Inspection
of the pro-
perties.

The Commissioners, having ascertained the properties to be divided, should next walk over and inspect each property, except those situate at a

distance, when the parties do not insist upon the inspection of such.

It is essential that plans should be prepared of the properties to be actually divided, but, except for some special reason, not of those to be allotted in their entirety. Preparation of plans.

It is also essential that a detailed valuation should be made of each property and of the different shares into which it is apportioned. The proper mode of valuing property for the purposes of partition is to consider what would be its value if it were put up to auction, and the parties interested were not allowed to buy—*Story v. Johnson*, You. and Col. 544. But whatever mode of valuation may be adopted, it is important that it should be a uniform mode, so that the value of each property intended to be allotted in its entirety, as well as of every portion of any property intended to be actually divided among the parties may be ascertained without inequality. When the shares of several persons are equal, the plans and valuation, after the apportionment into shares but before allotment, should be placed before the parties for acceptance, as then the parties may have no special interest in disputing the valuation of any share. Mr. Knapp in his work on Partition, p. 229 says:—
 “The law empowers them (the Commissioners) to employ, when necessary a surveyor and such persons skilled in the science of surveying as may be necessary to assist the surveyor in the performance of his labours.” Detailed valuation.

Where the estate consists of several properties, it is not necessary that each property should be divided, though care should be taken that each party has his full share in value—*Earl of Clarendon v. Hornby*, 1 P. Wms 446; *Peers v. Needham*, 19 Beav. 316. But it would not be right to allot, in its entirety, to any party the right to worship the Employment of surveyors.

Mode of division.
Family idol.

family idol.—Mitta Kunth Audhicarry *v.* Neerunjun Audhicarry (1874) 14. B. L. R. 166.

Family dwelling house.

The partition of the dwelling house of a joint Hindu family will be decreed if insisted on. In practice, that is, within the local jurisdiction of the Calcutta High Court, the family dwelling house is always actually divided among the parties except where they consent to its being allotted in its entirety to one or some of the parties.

In *Raj Coomaree Dassee v. Gopal Chunder Bose* (1878) 1. L. R. 3 Cal. 514, where two out of three coparceners consented, and the third objected, to a portion of the family dwelling house remaining joint, Justice White, in concurrence with Justice Mitter, made the following order:—“Let the Pooja Dalan, the rooms on either side of it, the courtyard attached thereto, and the western wall of that courtyard, be valued, and if any one or two of the coparceners wish to retain the same separately or jointly as part of his or their share, let the proportionate share of its value be paid to the remaining coparcener or coparceners who do not wish to retain the same. If none of the three coparceners agree to take the same as part or parts of their share or shares, paying to the other or others of them a proportionate share of its value, or if the three coparceners cannot agree amongst themselves as to which of them shall be allowed to take the same as part of his or their share or shares, then let this property be divided between the three coparceners in proportion to their respective shares in the same.”

Right of residence of a Hindu widow.

Where a Hindu widow has a right of residence in the family house, the partition should be made subject to such right—*Mungala Dabee v. Dino Nath Bose* (1869) 12 W. R., O. J., 35.

It is a matter of discretion to determine how best the estate, as it exists, may be partitioned

without unnecessarily detracting from the value of the estate or of the different portions thereof. To divide a particular portion of the property might be to diminish its value greatly. And one proprietor cannot claim that a particular part of the property to which he may have taken a fancy shall be so divided as to cause needless detriment to the interests of the other proprietors.

In each case the interests and rights of all the parties must be looked to, and effect given to them, as far as possible. But special regard should be had to the circumstance that a party has a particular interest in any property by reason of its situation in relation to adjacent property belonging to him or otherwise—*Padmamani Dassi v. Jagadamba Dassi* (1871) 6 B. L. R. 134 ; *Story v. Johnson*, 1 You. and Coll. 538 ; *Canning v. Canning*, 2 Drew 437.

Interests and rights of all the parties to be kept in view.

Proximity of separate property of a party.

“A Court of equity will assign to the parties respectively such parts of the estate as would best accommodate them, and be of most value to them with reference to their respective situations, in relation to the property before the partition. For, in all cases of partition, a Court of equity does not act merely in a ministerial character, and in obedience to the call of the parties, who have a right to the partition ; but it founds itself upon its general jurisdiction as a Court of equity, and administers its relief *ex aequo et bono*, according to its own notions of general justice and equity between the parties. It will, therefore, by its decree adjust all the equitable rights of the parties interested in the estate ; and will, if necessary for this purpose, give special instructions to the Commissioners, and nominate the Commissioners instead of allowing them to be nominated by the parties. (*Story Eq. Jur.* 2nd Eng. Edn. p. 634).

The word ‘allot’ has a different sense from

**Drawing
lots.**

merely drawing lots. It has the sense of appropriating whether by drawing lots or otherwise, the respective shares to the respective parties—*Canning v. Canning*, 2 Drew 436.

If the Commissioners can find no reason, weighing one way or the other then they are reduced to the alternative of drawing lots, because there is nothing else to guide them. But the drawing of lots is the last resort and ought only to be adopted when they do not find anything to guide their discretion one way or the other.

Where the allotment of shares is made by lots, an indifferent person should be called in to draw the lots.

**Right of
way of per-
sons not
being
parties to
the partition
proceed-
ings.**

The fact of particular persons or the public having acquired rights of way over the property sought to be divided, is no reason in law for refusing a partition, as those rights cannot be affected thereby. Nor is it a sufficient reason for refusing a partition, that some of the coparceners would be inconvenienced, if property held in common were divided—*Rampershad Narain Tewaree v. Court of Wards* (1874) 21 W. R. 152.

**Easements
of light and
air.**

On a partition, an easement of a continuous nature passes by implication of law, as well as by the general words of the conveyance.—*Rantanji Hormasji v. Edalji Hormasji* 8 Bom. H. C. Rep. O. J. 181; *Watts v. Kelson* L. R., 5 Ch. Ap., 166

At a partition of property in Calcutta, parties take their respective shares with easements of light and air as would be necessary for the reasonable use and enjoyment of the premises allotted to them respectively—*Bolye Chunder Sen v. Lalmoni Dasi* (1887) I. L. R. 14 Cal. 797.

**Custody of
title deeds.**

As to the custody of the title deeds on partition, the practice is, if all the parties are equally interested in the property, to give the custody to the plaintiff; but if they are not, then they are

usually given to the person who has the largest interest.—*Elton v. Elton*, 27 Beav. 632. .

The general rule as to costs is, that the parties **Costs.** bear their own costs of suit up to and including the decree, and that the costs of partition, that is of issuing and executing the Commission and confirming the return are borne by the parties in proportion to the value of their respective interests, but not the costs of any subsequent proceedings; as, settling conveyances, &c. The costs of the hearing on further consideration should be included in the costs to be borne by the parties in proportion to their interests.—*Agar v. Farifax*, 17 Ves. 557, and *Elton v. Elton*, 27 Beav. 632.

Where the plaintiff's right to a partition is questioned, the party questioning it unsuccessfully should be ordered to pay the costs occasioned thereby, *i.e.*, the extra costs occasioned by the plaintiff's title being disputed, and not the costs of making out his title; for, that is necessary in any event in a suit for partition—*Norris v. Timmins*, 1 Beav. 411; and *Hill v. Fulbrook*, Jac. 574; *Lyne v. Lyne*, 21 Beav. 318. .

The party who sues out, or has the carriage of, the Commission usually pays the costs of the partition in the first instance, but any party may do so and then proceed to recover from each of the other parties his proportionate share ascertained on taxation. The mode of proceeding to compel payment is by execution, preceded by a *rule nisi* in which the amount claimed is specified.

**Payment of
costs how
enforced**

Although in a partition suit, the Court has the property before it and within its reach, it does not order any portion of the property to be sold for the payment of costs, otherwise than in the course of execution, except where some of the parties are under disability, and some other person is, therefore, liable in the first instance for the costs

incurred in their behalf. It is then only that it orders *these* costs to be charged upon, and raised by sale of, the shares allotted to the persons under disqualification—*Kailas Chandra Ghose v. Ful Chand Jaharri* (1871) 8 B. L. R. 474; *Singleton v. Hopkins*, 1 Jur., N. S., 1199.

No lien for Commissioners' charges.

The Commissioners have no lien on the Commission for their charges.—*Young v. Sutton*, 2 V. and Beames 265; *Raj Moheshey Debi v. Muddoo Shudan Dey*, Bourke's Repts. 24.

Rights of a mortgagee from a co-sharer.

In *Byjnath Lal v. Ramoodeen Chowdhry* (1874) L. R., 1 I. A. 106; 21 W. R. 233, the Privy Council held that one co-sharer in a joint and undivided estate could not deal with his share so as to affect the interests of other co-sharers, and persons who take any security from one co-sharer, do so subject to the right of the others to enforce a partition; and further, that a mortgagee who takes such a security in the share of one co-sharer who has no privity of contract with the other co-sharers, would have no re-coursé against the lands allotted to such co-sharers but must pursue his remedy against the lands allotted to the mortgagor. To the same effect see *Sharat Chunder Burmon v. Hurgobindo Burmon* (1878) 1 L. R. 4 Cal. 510; and *Hem Chunder Ghose v. Thakomoni Debi* (1893) 1 L. R. 20 Cal. 533. In *Hridoy Nath Shaha v. Mohobutnessa Bibi* (1892) 1 L. R. 20 Cal. 285, a putni lease was granted of certain lands which, according to a private partition made by all the co-sharers, had been assigned to the mortgagor, one of the co-sharers. At a subsequent partition by the Collector, the lands of the putni were allotted to a different shareholder. The Judges distinguished this case from the previous case of *Byjnath*, where there had been no previous partition at the instance of *all* the sharers, and held that the putni would stand notwithstanding the

Rights of a putnidar.

partition by the Collector. The reason of the decision was that the putni of specific lands, though granted by *one* co-sharer, was the result of a partition made by *all* the co-sharers and was therefore binding on all.

In *Parbhu Das Lakhmi Das v. Shankar Bhai* (1886) 1. L. R. 11 Bom. 662, it was held that the duty of the Collector, to whom a decree had been transferred under Sec. 265 of the Civil Procedure Code, was not confined to a mere division of the lands decreed to be divided, but included the delivery of the shares to their respective allottees.

Partition by
Collector.

Collector to
complete
partition
proceedings
by delivery
of posses-
sion.

Where a reference, as above mentioned, is made to a Collector, the Civil Court would have no jurisdiction to examine his work.—*Dev Gopal Savant v. Vasudev Vithal Savant* (1887) 1. L. R. 12 Bom. 371; and *Shrinivas Hanmant v. Guru Nath Shrinivas* (1890) 1. L. R. 15 Bom. 527.

Even after the final judgment of Court in a partition suit, parties execute mutual conveyances or releases in respect of properties within the town of Calcutta. But in the Mofussil, this practice does not obtain.

Exchange
of mutual
conveyances
in Calcutta.

The expenses of a partition suit in the original side of the Calcutta High Court are proverbially enormous. They are out of all proportion to the value of the property under partition.

Expenses
of a parti-
tion suit in
the original
side of
Calcutta
High Court

A co-sharer when he is evicted by title paramount after partition has the right to obtain compensation for the portion lost. Mr. Freeman on this point says:—"Upon partition, the parties are in *equali jure*; there is supposed to be mutual confidence by reason of the privity of estate; and the object is to make an equal division of a common fund. There is no chaffering or trafficking about it. Third persons, selected by themselves, or appointed by the Court, make the division, and if the common fund is not so large, as the parties

Failure of
title after
partition.

suppose, either from defect of title or of unsoundness as to part, the loss should be borne equally; in other words, in partition, there is an implied warranty both as to title and soundness."* Of course, before any co-sharer can obtain compensation he must show that the eviction was not due to his laches, or to any act or omission on his part, done or made since after the partition. The proceedings in the suit in which he was sued alone and evicted would be no evidence in *his* suit against his co-sharers.

Forms of Plaints in Partition Suits.

(I)

(*Title*).

The plaintiff abovenamed states as follows:—

1. That the plaintiff and the defendants *Y* and *Z* are the owners of, and possess as *tenants in common* (or jointly), the following properties situated in _____ within the jurisdiction of this Court to wit—_____

and that the plaintiff desires a partition of them.

2. That the plaintiff has an estate of inheritance therein to the extent of one undivided third part and that each of the said defendants *Y* and *Z* has a similar estate of one undivided third part.

3. That there are no liens or encumbrances thereon appearing of record, and that no person other than the plaintiff and the said defendants are interested in the said premises as owners or otherwise.

Wherefore, the plaintiff prays judgment :

For a partition and division of the said premises according to the respective rights of the parties aforesaid, (or if a partition cannot be had without material injury to those rights, then for a sale of the said premises or the portion thereof described herein to wit (insert description) and a division of the proceeds between the parties, according to their rights, after payment of the costs of this action and for partition of the remainder).

(2)

Another Form.

(*Title*).

The plaintiff abovenamed states as follows :—

1. That on or about the day of 18 , one C. B. died intestate possessed of the following described properties.

2. That the said C. B. left M. B. his widow one of the defendants, who is entitled to dower in the said premises.

3. That the said deceased C. B. left as his children and only heirs at law the plaintiff and defendants N. C., and P. D.

who are tenants in common with the plaintiff in the said premises.

4. That the plaintiff and defendants each are entitled as such heirs, subject to the said dower, to an undivided part of the said properties. [If there are incumbrances upon the premises the holders should be made parties and a particular statement of the incumbrances made].

Wherefore the plaintiff demands judgment : that the shares of the parties as above alleged in and to the said property be confirmed ; that partition thereof be made (or if the same cannot be equitably divided, then that a sale of the said premises or a portion thereof and division of the proceeds and partition of the remainder may be made between them, according to their respective shares and that such other orders may be made as shall be deemed just in the premises).

Preliminary decree in Partition suit.

—

In the Court of the ——— of ———

Present :

—

(Title of Cause).

Upon reading the plaint of the plaintiff abovenamed and the written statements of the defendants abovenamed and such oral and documentary evidence as both the parties abovenamed produced :

It is hereby ordered and adjudged, That parti-

tion be made of the property herein below mentioned between the parties entitled thereto according to their respective rights, shares and interests in said property, which said rights, shares and interests are as follows so far as the same have been ascertained, to wit (here set forth the interests of the parties as ascertained) and that T. R., F. I., and J. M. three reputable and disinterested gentlemen be and they are hereby designated as Commissioners to make the said partition.

And it appearing to the Court that the defendants A. B. & C. D. desire to enjoy their shares in common with each other, it is hereby directed that partition be so made as to set off to the said A. B. and C. D. their shares of the property partitioned without partition as between themselves to be held by them in common.

And if the said Commissioners find that partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of them, then they shall report the amount of compensation to be made by the parties respectively for equality of partition; but they shall not report that compensation be made by a party who is unknown or whose name is unknown, nor by an infant, unless it appears that he has personal property sufficient to pay it and that his interests will be promoted thereby.

And it is further directed that all the parties to this action shall produce to, and leave with, the said Commissioners, for such time as the Commissioners shall deem reasonable, all deeds, writings, surveys or maps relating to the premises or any part thereof.

Form of
Report of Commissioners making Partition.

(Title of Cause).

To

THE JUDGE OF——

In pursuance of a preliminary decree of this Court made in the above entitled action on the day of 18 , we, the undersigned Commissioners thereby appointed and designated to make partition of the premises described in the said judgment, among the parties entitled thereto, according to their respective estates and interests therein, do hereby report.

That having been appointed Commissioners as aforesaid we have carefully examined the premises described in the said judgment and caused them to be surveyed and have made partition thereof between the said parties according to their respective rights and interests therein, as the same have been ascertained, declared and determined by the said Court in and by the said judgment in manner following:—

We divided the whole of the said premises other than the portion herein let off to the defendant M. F., as her dower interest therein, into allotments, the lots composing which are designated on the map hereunto annexed by the letters A, B, C, etc., each of which allotments is, in our opinion, of equal value, and that being in our judgment the most beneficial division, all circumstances considered, that could be made of such premises

and that we have set off in severalty to the said plaintiff S. G. all those certain parcels of the said premises designated on said map by the letter A and which are respectively bounded as follows—
—— as will more fully appear by reference to said map.

And we have also set off in severalty to the said defendant I. G. all those certain pieces or parcels of said premises, designated on the said map by the letter B, which are respectively bounded as follows—— as will also more fully appear by reference to said map.

And we have set off to the defendants A. H. and E. C. all those certain pieces or parcels of said premises designated on the said map by the letter C which are respectively bounded as follows—— as will also more fully appear by reference to said map to be held by them in common.

And we further report that we have set off in severalty to the defendant M. F. as her dower right in said property the premises described as follows—— and designated on said map by the letter D. and we have made partition of the said lot D. among the parties entitled thereto in remainder as follows:—to the plaintiff S. G. the lot designated on said map by the letter E. and described as follows:—and to the defendant I. G. the lot designated on said map by the letter F. and described as follows——, to be enjoyed by them respectively upon the determination of said dower interest by the death of the said M. F.

And we have set off in severalty to the defendant having the—— share in said property, who is unknown, the parcels of said property marked N. upon said map and described as follows:—

And it appearing to us that partition cannot be made equal between the parties according to their

respective rights, without prejudice to the rights and interests of some of them and that the payments hereinafter named are necessary to produce such equality we have awarded compensation to be made between the parties as follows:—the plaintiff S. G. is to pay the defendant I. G. the sum of Rs. —.

And we further certify and report that the items of the various expenses attending the execution of the said Commission including our fees as Commissioners are contained in a schedule hereto annexed marked A. and forming part of this, our Report, and that we have caused a map to be made thereof, as aforesaid, showing what parts of the said premises have been allotted to the respective parties which map forms a part of this our report and is hereto annexed marked B.

In witness whereof, we, the said Commissioners have set our hands to this our report this
day of 18 .

Schedule A.

For services as, Commissioners at Rs. a day
for—days Rs.———
Cash paid for services as surveyor Rs.———

Final decree upon report of Commissioners making
actual partition.

In the Court, &c.

(Title of Cause).

This cause having been brought on to be heard upon the report of Commissioners appointed therein under and by virtue of the preliminary decree dated the and upon reading and filing the said report bearing date the—— day of ——— 18 and proof of due service of notice of application for judgment thereupon on the attorneys for all parties who have appeared herein having been made, and it appearing by the said report that the said Commissioners have made partition of the premises described in the plaint in this action between the parties to this action according to their respective rights and interests therein as the same have been ascertained declared and determined by this Court and by which said partition the said Commissioners have divided the whole of said premises other than the portion thereof set off to the defendant M. F. as her dower interest therein into two allotments of equal value and have set off in severalty to the plaintiff S. G. one of the said allotments bounded and described as follows (insert description) as will more fully appear by a map of said partition thereto annexed being the lots marked A. on said map; and it also appearing by said report that by such partition the said Commissioners have set off in severalty to the defendant I. G. the other of the said allotments which is bounded and des-

cribed as follows, to wit: (insert description) as will also more fully appear by reference to the said map of the partition annexed to such report being the lots marked B. on the said map:

And it further appearing by said report that the said Commissioners have set off in severalty to the defendant M. F. as her dower interest in the said premises partitioned, the following described property, to wit (insert description) and that they have made partition of the said last mentioned lot among the parties entitled thereto in remainder as follows: to the plaintiff S. G. the lot designated on the said map by the letter E and described as follows to wit, (insert description) and to the defendant I. G. the lot designated on said map by the letter F and described as follows to wit (insert description) to be enjoyed by them respectively upon the determination of the said dower interest by the death of the said M. F.

Now on motion of _____ Counsel for plaintiff and after hearing _____ for defendants.

It is ordered, adjudged and decreed and this Court by virtue of the authority therein vested doth order, adjudge and decree that the said report and all things therein contained do stand ratified and confirmed and that the partition so made be firm and effectual for ever.

And it having appeared by the said report that partition cannot be made equal between the parties according to their respective rights, without prejudice to the rights and interests of some of them and that the following payments are necessary to produce such equality, it is hereby ordered and adjudged, that compensation be and is hereby awarded between the parties as follows: that the defendant I. G. pay to the said plaintiff S. G. the sum of _____.

And it is further ordered and adjudged that

each of the parties who is entitled to the present possession of a distinct parcel of said premises hereby assigned to him be let into the possession thereof immediately and that the parties who are entitled to possession of distinct parcels of said premises after the expiration of dower interest therein of the defendant M. F. be let into possession thereof after the determination of the said estate of the said M. F. by the death of the said M. F.

And it is further ordered and adjudged that the said S. G. pay to the said S. the one-half of the costs and charges of the proceedings in this cause, the whole amount of said costs and charges being the sum of Rs. and that the said S. G. have execution therefor.

LECTURE XII.

Procedure for the partition of Revenue-paying estates in Bengal.

Bengal law of partition of Revenue-paying estates—Estate—Joint undivided estate—Separate liabilities on opening separate accounts—Advantages of partition to proprietors—to Government—Reason why Government have not left to parties to apportion Government-revenue—Revenue officers in Bengal—Civil Courts ousted of their jurisdiction—Summary of the Act—Fundamental principle for apportionment of revenue—Who can demand partition—Applications for partition—Sec. 24—Sec. 25—Sec. 26—Sec. 28—Sec. 27—Sec. 33—Establishment for partition and costs thereof—Adoption of rent-roll and measurement—Partition by arbitrators—General arrangement of partition—Mode of division—Compactness—Confirmation of partition by Commissioner—Analogy between partition by Collector and that by Civil Court—Rules of Board of Revenue.

**Bengal Law
of partition
of revenue-
paying
estates.**

The rules for the partition of "immovable property that we considered in the last Lecture were those provided for in the Civil Procedure Code and Act IV of 1893. But Section 396 of the Code of Civil Procedure and Sec. 1 cl. (4) of Act. IV of 1893 expressly exclude from the operation of the Code and the Act, all immovable property for which revenue has to be paid to the Government by the joint owners. I have advisedly added the words "by the joint owners," for, as a rule, all the land in the country pays the Government revenue, and what is excluded from the operation of the Code and the Act, is the proprietary interest for which revenue has to be paid direct to Government by the joint owners. Thus a revenue-paying Mehal owned jointly by A and B as Zemindars may be let in *putnee* to X and Y

as joint *putneedars*. The separate interests of X and Y may be partitioned under the Civil Procedure Code with the consent of the Zemindars, A and B. But the Zemindari interests of A and B cannot be partitioned under the Civil Procedure Code. The properties that are excluded from the Civil Procedure Code and Act IV of 1893, are estates paying revenue to Government and so far as Bengal is concerned, the law for the partition of these excluded properties is contained in Act VIII of 1876 of the Council of the Lieutenant Governor of Bengal.

In the present Lecture I shall consider the rules for the partition of revenue-paying estates in Bengal.

The word "Estate" has been defined in the Act, as meaning "all lands which are borne on the revenue-roll of a Collector as liable for the payment of one and the same demand of land revenue." When such an estate is owned by two or more proprietors jointly *i.e.*, without an actual division of lands and without an apportionment of the liability for revenue, the estate is called 'a joint undivided estate.' Now we know that though an estate may be joint, the proprietors often separately discharge their respective liabilities for the Government revenue and divide among themselves the rent collections in proportion to their shares. But so long as the estate remains joint and undivided, the entire estate under Act XI of 1859, remains liable to Government for the entire revenue, and if the proprietors do not discharge fully their separate liabilities the entire estate is sold summarily under the sunset laws (Act XI of 1859,) and all the proprietors without distinction lose the estate. It is true that separate accounts may be opened under Sec. 10 and 11 of Act. XI of 1859 by co-sharers

'Estate.'

Joint undivided estate

Separate liabilities on opening separate accounts

**Advantages
of partition
to proprie-
tors.**

willing to pay separately their shares of revenue. but you must remember that even when separate accounts are opened, the entire estate may be sold if a sale of the defaulting share proves insufficient for the realization of the amount due. It is of the highest importance therefore to joint-proprietors of estates that they should be able to create separate estates with separate liabilities out of an entire undivided estate. The object of a partition under the Estates Partition Act of 1876 is to bring about such a state of things. And accordingly in Act VIII of 1876 although the word "partition" is not defined we find the word "applicant for partition" defined as meaning "a person" who has applied to the Collector under the provisions of the Act, for the separation from the parent estate of land representing his interest in such parent estate, and for the assignment to him of such lands as a separate estate liable for a demand of land revenue distinct from that for which the parent estate is liable."

**To Govern-
ment.**

I have said above that it is of the immense importance to joint proprietors that they should be able to create separate estates with separate liabilities. But it is not the joint owners alone who are interested in the division. Government also would have greater security in the separate than in the aggregate assessments ; for, we know from our daily experience how small debts are sooner realized from the individual debtors than large debts from a number of persons jointly liable. There is another way in which Government is interested in the division. If it rested with the proprietors alone to make the division so as to bind the Government to whom the revenues have to be paid, the proprietors might create false estates *i.e.*, estates in the names of unknown persons with small areas and large

**Reason why
Government
have not left
to parties to
apportion
Government
revenue.**

revenues and appropriate the rest of the lands among themselves for nominal revenue-demands, so that when the false estates would be sold under the sunset laws, no bidders would come forward and the revenues assessed thereupon would be a loss to the State. We have seen that for similar reasons in the case of tenants holding under landlords, Sec. 88 of the Bengal Tenancy Act provides that a division of a tenure or holding or a distribution of the rent payable in respect thereof would not be binding on the landlord unless it is made with his consent in writing. It is clear then that a partition of revenue-paying estates should not be allowed to be made among the persons liable for the Government revenues without the consent of the Government.

We have seen before that it is the interest of Government to encourage divisions into small estates and we have now seen that Government ought to be careful that the divisions are made properly. There is a further consideration as regards the Government. They have to provide for the administration of justice and it is the duty of their revenue officers to see not only that the Government interests are protected but also that in protecting the interests of Government, they do no injustice to any subjects. The rules of procedure for the partition of revenue-paying estates contained in Act VIII (B. C.) of 1876 have been accordingly prescribed for securing all the above objects.

The revenue officers of the Government in Bengal are the Sub Deputy Collectors, the Deputy Collectors, the assistant Collectors, the Collectors, the Commissioners and the Board of Revenue. They are the officers authorized to effect partitions of estates and to take cognizance of all questions relating to such partitions. Finally the Lieutenant-

Revenue
officers in
Bengal.

Governor has been authorized to re-open a partition on proof of fraud within 12 years after it has been actually effected.

Civil Courts
oust of
their juris-
diction

The policy of the Act is to confer exclusive jurisdiction in questions of partition of revenue-paying estates on the revenue officers, and accordingly we find Sec. 149 of the Act excepting from the jurisdiction of the Civil Courts questions relating to partitions of estates. The same observations would apply to the second para of Sec. 133 which similarly excludes from the jurisdiction of the ordinary Civil Courts orders passed by the Lieutenant-Governor re-opening partitions. You should observe that Sec 30 limits the jurisdiction of the Civil Courts in these matters.

But it is worthy of note that it is only the questions that concern the apportionment of the revenue that are excepted. Thus Sec. 150 provides that the orders of the revenue officers determining questions of title to lands as between the proprietors of the estate under partition on the one hand and the proprietors of a conterminous estate on the other, as well as orders determining the shares of individual proprietors would be capable of being contested in the ordinary Civil Courts.

The Estates Partition Act contains elaborate rules of procedure for division of estates and I have in the Appendix at the end printed the Act in extenso with explanatory notes of some of the sections. In cases of doubt as to the exact interpretation of any section, the section itself will have to be referred to and read in connection with the context. I shall therefore give you here a mere summary of the Act.

Summary
of the Parti-
tion Act.

The Act is divided into ten Parts.

Part I contains the definitions of words used in the Act and lays down the principles of division

in these words. "The amount of land revenue assessed on each separate estate shall bear the same proportion to the whole amount of land revenue for which the parent estate was liable as the assets of such separate estate bear to the whole assets of the parent estate" (Sec. 8.) This rule commends itself as at once just and fair to all the proprietors. It is founded on the principle that every joint owner is entitled to the profits of the joint estate in proportion to his share.

**Funda-
mental prin-
ciple of
apportion-
ment of
revenue.**

Part II treats of the right to claim partition.

Under Act VII (B.C.) of 1876, Sec. 38 every joint proprietor of an estate has to register his name in respect of the share owned by him. This part provides that every recorded proprietor (whose name has been registered under Act VII (B.C.) of 1876) in actual possession except (1) one who holds a mere life estate, (2) when there has been a private partition in accordance with which the proprietors have been in possession, (3) when the revenue upon the separated portion does not exceed one Rupee and the owner of the share does not agree to redeem the amount of revenue under rules for redemption of Government revenue, and (4) when the partition would have the effect of creating out of a compact estate several estates, each consisting of scattered parcels of land, has a right to demand partition. Though a sharer whose name is not recorded would not have a right to demand partition, he would of course be entitled to his share when the partition actually takes place. Sec. 9 contained in this Part treats of the various modes of separation. Thus when a man is the owner of a fractional share in the parent estate, as in cases under Sec. 10 of Act XI of 1859, the effect of the partition proceedings will be to allot to him lands cal-

**Who can
demand
partition**

culated to yield the same fractional share of the gross assets of the entire estate. This is one mode of partition. There is a second mode and that is when a man is in possession, as in cases under Sec. 11 of Act XI of 1859, of specific lands included in a parent estate. In such a case the effect of the partition proceedings is to determine the amount of Government revenue payable for the lands in possession.

I have said that a partition cannot be made at the instance of a recorded proprietor if it should appear that there was a previous partition privately effected according to which the parties were in possession. But if all the proprietors join in the application, a partition would be effected. There is a practice for owners of estates or shares in estates to transfer specific parcels of land on condition of the transferee paying a certain determined sum on account of Government revenue. If the sum privately apportioned by the owner or sharer does not correspond to the lands assigned, (according to the calculations of the Revenue officers) the Revenue officers will be bound to refuse the partition. But should the parties waive the condition as to the amount of revenue, the partition would be effected.

**Application
for partition**

Part III treats of applications for partition to the Collector of the District. You should note that Sec. 18 requires the applicant to state the names of all the proprietors recorded or unrecorded and that Sec. 22 enjoins the Collector to cause service of notice on all such proprietors. Should disputes arise as to the extent of the interest of the applicant for partition, the Collector is to stay his hands for 4 months but if within this period he receives no precept from the Civil Court to stay the partition, he is competent to resume the partition after the period and effect a division.

Sec. 24.

Sec. 25

Sec. 26.

In such a case should the Civil Court after the partition make a decree the Court has to make it in recognition of the partition proceedings *i.e.*, as if the partition had been effected before suit. If on the other hand the decree of the Civil Court be passed while yet the partition proceedings are pending, the division should be made according to the decree. Sec. 31 makes a very important provision. It requires the Collector to declare if the estate is to be partitioned and if so into what shares and in which of the several modes. After making the above declaration, the Collector can transfer the proceedings to the Deputy Collector *i. e.*, according to the definitions, to any assistant Collector, Deputy Collector or Sub-Deputy Collector whom the Collector may appoint to effect a partition and allotment of assessment under the Act, or to conduct any of the proceedings connected with such partition and allotment.

Sec. 28

Sec. 27

Sec. 33.

Part IV treats of the establishment necessary for effecting a partition and provides for the recovery of the costs of partition from the owners of estates. You will note that under Sec. 40 the costs would be ordinarily realizable from the owners in proportion to their respective shares in the parent Mehal. This part provides also for the establishment of the "Estates Partition Fund."

Establishment for partition and costs thereof.

Part V treats of the partition proceedings up to the adoption of a rent roll and measurement papers. In order that the Revenue authorities may apportion the Government revenue on all the separated shares, or, as they are called, *puttis*, and allot lands in due proportion, the rents payable for the various classes of lands comprised in the estate and the areas of the different classes of lands should be ascertained. The Collector after making the declaration under Sec. 31, generally

Adoption of rent-roll and measurement

refers the proceeding to the Deputy Collector and this latter officer with the help of amins and surveyors collects the necessary information. You will note that the amins and Deputy Collectors can call upon the parties to produce their own measurement and collection papers.

Partition by arbitrators.

Part VI treats of partition by arbitrators. You will note that under Sec. 69, the Collector has to assess the Government revenue on each separate estate into which the arbitrators may divide the parent estate.

General arrangement of partition.

Part VII treats of the proceedings from the determination of the general arrangement of the partition by the Deputy Collector to the approval of the partition by the Collector.

You will note that the law requires the Deputy Collector to consult orally all the proprietors present and to determine in concurrence with them upon the general arrangement of the partition. The Deputy Collector then sends the plans, measurement papers and his project of the partition with calculations to the Collector who has to approve or disapprove of the project. If the project is disapproved, the case is remanded to the Deputy Collector and if it is approved the papers are forwarded to the Commissioner upon whose confirmation depends the completion of the partition.

Mode of division.

Part VIII treats of the general principles on which partition is to be made.

Now two or more estates may have as between or among them lands in common. These lands should be first partitioned among the different estates before the partition of any of those estates is taken up in hand.

There may be disputes about the possession of some lands between the proprietors of the estate under partition on the one hand and

other* persons. If the lands be in possession of the proprietors of the estate under partition and further if it should appear that the claim of the other persons is untenable, the Collector can make the partition, but otherwise he is enjoined to strike off the proceedings.

So, if lands in the estate under partition be actually held rent-free, then, whether their rent-free character be good or bad, the partition proceedings should be made on the basis of the lands being treated as rent-free unless they are capable of being rateably partitioned among the owners.

Sec. 87 provides that every attempt should be made to secure compactness in the division into parcels and the next Section requires the revenue officers to regard the advantages, and disadvantages of the situation of the land in reference to roads, railways, water channels &c.

Compactness.

If in the dividing of the land, the dwelling house or garden of any proprietor should fall into the *putti* of another proprietor, the law allows the former to enjoy the same as a permanent holding or tenure under the latter for rent fixed by the revenue authorities. This part also provides for the drawing of lots in the case of equal shares as well as in other cases, and for keeping apart as common property certain portions of the property under partition.

Part IX treats of proceedings ending with the confirmation of a partition by Commissioner. You will note that Sec. 123 gives the Collector authority to put the owners into possession of their separated shares.

Confirmation of partition by Commissioner.

Part X treats of various matters. We have seen how the jurisdiction of the Civil Courts is ousted in respect of all questions relating to the . .

* Sec. 116.

apportionment of Government revenue and how such jurisdiction is kept intact as respects other matters. Then, there are elaborate provisions for appeals from various orders passed by Deputy Collectors and Commissioners. We have already noticed the provisions which authorize the Lieutenant-Governor to re-open a partition within 12 years of its completion.

You should note the provisions of Sec. 128 under which a lease of an undivided interest before partition holds good in respect of the divided share after partition. But if there had been a private partition before the granting of the lease, the lease would hold good notwithstanding the partition (*ante* p: 398). You should also note the important provisions of Sec. 117 which provides for the case when after the completion of partition proceedings the title to some lands included in a *puttee* fails.

**Analogy
between
partition by
Collector
and that by
Civil Court.**

In conclusion let me point out to you the close analogy that exists between the procedure prescribed in the Civil Procedure Code for the partition of immovable property in general and that which we have just considered.

In both cases the applicants must be sharers and entitled to immediate possession; in both cases all the persons interested must be parties to the proceedings; while in one case there must be a preliminary decree and a reference to Commissioners for partition, in the other, there must be a preliminary order under Sec. 31 determining the shares and the mode of partition and a reference to the Deputy Collector. The duties of the Commissioners for partition are similar to those of Deputy Collectors under the Estates Partition Act. While in one case the Civil Court has the making of the final decree of partition, in the other case the Commissioner's order confirming the Collector's

report completes the partition; so also if in one case upon failure of title to a portion of a separated share the owner of such share can claim compensation, in the other the owner is expressly declared entitled to compensation. In conclusion the rules for partition contained in Part VIII of the Estates Partition Act are all founded on equity and the Civil Courts in the absence of any rules adopt them in making allotments.

Under Sec. 152 the Board of Revenue are authorized to make rules for the guidance of officers in conducting partitions. The rules now in force have been printed in the Appendix.

**Rules of
Board of
Revenue**

LECTURE XIII.

Procedure for Partition of estates in the N.-W. Provinces, Oudh, the Punjab, the Central Provinces, Assam and the Presidencies of Madras and Bombay.

THE LAW OF THE N.-W. PROVINCES.

The law of partition of revenue-paying estates in the N.-W. P. is contained in Secs. 107 to 139 of Act XIX of 1873.

The Law in force has been printed in the Appendix with explanatory notes of some of the sections, and the Rules of the Board of Revenue, N.-W. Provinces.

The leading features of the Law of Partition are :—

(1) There are two kinds of partition, — perfect and imperfect. Perfect partition makes a severance of the lands and the Government revenue so as to create distinct mahals. Imperfect partition effects a division of one property into two or more properties, jointly responsible for the revenue assessed on the whole. This agrees in some respects to the opening of separate accounts under Act XI of 1859 in Bengal.

Under Sec. 150 of the Act arrears of revenue may be recovered by sale of a *putti* or of the whole mahal as well as by other means. When an imperfect partition has been made of any mahal, the Collector generally sells the defaulting share in the exercise of his discretion. This is the reason why proprietors sometimes make imperfect partitions. An imperfect partition can only be made with the consent of all the owners.

(2) Questions of title involved in applications for perfect partition may be tried by the Collector of the District or the Assistant Collector in the course of his making a partition, and his decision would have the effect of a decision of a Civil Court and would be open to appeal like other decrees in civil cases.

(3) The amount of revenue to be paid by each portion of a divided mahal is determined by the Collector (Sec. 128.)

(4) The word "revenue-free" has a peculiar signification under the Act. It applies "to land whereof the revenue has either wholly or in part been released, compounded for, redeemed or assigned." (Sec. 3 cl. 10).

(5) The rules for the partition of revenue-paying mahals have been made applicable to the partition of revenue-free mahals by Sec. 139. The word "revenue-free mehal," would here mean only mahals partially released from the revenue-demand.

(6) The jurisdiction of the Civil Courts is barred (Sec. 135).

(7) Mahals are to be made as compact as possible (Sec. 123).

ODDH LAW.

The Law for the partition of revenue-paying mahals in Oudh is contained in Sec. 68—101 of Act XVII of 1876.

These sections have been printed in extenso at the end of the book in the Appendix with explanatory notes.

You will find that the law of partition in Oudh is almost the same as in the N.-W. Provinces. The following are some of the principal distinctions.

(1) The chief controlling revenue authority

in all matters connected with land revenue is the Chief Commissioner of Oudh.

Under him are the Commissioner for each Division including several districts, the Deputy Commissioner for each District and the Assistant Commissioner.

The powers of the Deputy Commissioner are the same as those of the Collector of a District and the Deputy Commissioner is the revenue-authority to make partitions.

(2) When the Deputy Commissioner has decided upon a partition he may, with the sanction of the Commissioner, hold the mahal under direct management pending the completion of the partition.

(3) The rules for the partition of mahals have been made applicable to the partition of revenue-free estates and to taluqdary and underproprietary mahals and mahals held by lessees whose rent has been fixed by the Settlement-officer (Sec. 99 and 100).

THE PUNJAB LAW.

The Law for the partition of Revenue-paying estates in the Punjab is contained in Chapter IX Act XVII of 1887. This chapter has been printed in the Appendix at the end.

You will observe that the Revenue-Officers are authorized to effect partitions of tenancy with the express consent of the landlord and to make decrees in other cases where the partition has been effected otherwise than through his intervention.

Sec. 121 contemplates the preparation of an instrument of partition which under Section 122 can be executed as a decree of Court within 3 years of its date.

THE CENTRAL PROVINCES LAW.

The Law for the Partition of estates paying revenue to Government is contained in Chapter X of Act XVIII of 1881 as amended by Act XVI of 1889. The sections bearing on the Law of Partition have been printed in extenso in the Appendix at the end.

This Act adopts the provisions of the Partition Acts for the N.-W. Provinces and Oudh.

ASSAM LAW.

The Law of Partition of Revenue-paying estates in Assam is contained in Regulation I of 1886, Chapter VI.

These provisions have been printed in extenso in the Appendix.

MADRAS LAW.

By Reg. XXV of 1802 the Government declared its intention to fix for ever a moderate assessment of public revenues on all lands. Sec. 3 of Regulation provides for the grant on the part of the British Government to the Zemindars or proprietors of land, *Sanad-i-milkiyat-i-istimrar* or deed of permanent property and of a corresponding *kubulyat* on the part of the Zemindar to the Collector of the District.

In reference to the question of the partition of revenue-paying estates, Secs. 8 and 9 of this Regulation, Secs. 44, 45 and 46 of Madras Act II of 1864, the whole of Madras Act I of 1876 and Secs. 17, 18, 20—24 of Reg. II of 1803 (all of which have been printed in the Appendix at the end) have to be consulted.

BOMBAY LAW.

The Law of Partition of revenue-paying estates in Bombay is contained in Secs. 113-117 of the Bombay Act V of 1879. The Sections with explanatory notes have been printed in the Appendix.

APPENDIX.

Sections of the Civil Procedure Code, ACT XIV OF 1882, bearing on partition.

D.—Commission to make Partition.

396. In any suit in which the partition of immovable property, not paying revenue to Government appears to the Court to be necessary, the Court, after ascertaining the several parties interested in such property and their several rights therein, may issue a commission to such persons as it thinks fit to make a partition according to such rights.

Commission
to make parti-
tion of non-
revenue pay-
ing immov-
able property.

The Commissioners shall ascertain and inspect the property, and shall divide the same into as many shares as may be directed by the order under which the commission issues, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares.

Procedure of
Commis-
sioners.

The Commissioners shall then prepare and sign a report, or (if they cannot agree) separate reports, appointing the share of each party, and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the commission and transmitted to the Court; and the Court, after hearing any objections which the parties may make to the report or reports, shall either quash the same and issue a new commission, or (where the Commissioners agree in their report) pass a decree in accordance therewith.

E.—General Provisions.

**Expenses of
commission
to be paid
into court.**

397. Before issuing any commission under this chapter, the Court may order such sum (if any) as it thinks reasonable for the expenses of the commission to be, within a time to be fixed by the Court, paid into court by the party at whose instance or for whose benefit the commission is issued.

**Powers of
Commis-
sioners.**

398. Any Commissioner appointed under this chapter may, unless otherwise directed by the order of appointment,—

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him ;

(b) call for and examine documents and other things relevant to the subject of inquiry ;

(c) at any reasonable time enter upon or into any land or building mentioned in the order.

**Attendance,
examination
and punish-
ment of wit-
nesses before
Commis-
sioner.**

399. The provisions of this Code relating to the summoning, attendance and examination of witnesses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall apply to persons required to give evidence or to produce documents under this chapter, whether the commission in execution of which they are so required has been issued by a Court situate within, or by a Court situate beyond, the limits of British India.

For the purposes of this section, the Commissioner shall be deemed to be a Court of Civil Judicature.

**Court to di-
rect parties to
appear before
Commis-**

400. Whenever a commission is issued under this chapter, the Court shall direct that the parties to the suit shall appear before the Commissioner in person or by their agents or pleaders.

**Procedure
ex parte.**

If the parties do not so appear the Commissioner may proceed *ex parte*.

ACT IV OF 1893.

PASSED BY THE GOVERNOR GENERAL OF INDIA IN COUNCIL.

*(Received the assent of the Governor General on the
9th March, 1893.)*

AN ACT TO AMEND THE LAW RELATING TO PARTITION.

Whereas it is expedient to amend the law relating to partition; It is hereby enacted as follows :—

1. (1) This Act may be called the Partition Act, 1893. Title, extent, commencement and saving.
- (2) It extends to the whole of British India; and
- (3) It shall come into force at once.
- (4) But nothing herein contained shall be deemed to affect any local law providing for the partition of immovable property paying revenue to Government.
2. Whenever in any suit for partition in which, if instituted prior to the commencement of this Act, a decree for partition might have been made, it appears to the Court that, by reason of the nature of the property to which the suit relates, or of the number of the shareholders therein, or of any other special circumstance, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders, the Court may, if it thinks fit, on the request of any of such shareholders interested individually or collectively to the extent of one moiety or upwards, direct a sale of the property and a distribution of the proceeds. Power to Court to order sale instead of division in partition suits.
3. (1) If, in any case in which the Court is requested under the last foregoing section to direct a sale, any other shareholder applies for leave to buy at a valuation the share or shares of the party or parties asking for a sale, the Court shall order a valuation of the share or shares in such manner as it may think fit and offer to sell the same to such shareholder at Procedure when sharer undertakes to buy.

the price so ascertained, and may give all necessary and proper directions in that behalf.

(2) If two or more shareholders severally apply for leave to buy as provided in sub-section (1), the Court shall order a sale of the share or shares to the shareholder who offers to pay the highest price above the valuation made by the Court.

(3) If no such shareholder is willing to buy such share or shares at the price so ascertained, the applicant or applicants shall be liable to pay all costs of or incident to the application or applications.

Partition suit
by trans-
feree of
share in
dwelling-
house.

4. (1) Where a share of a dwelling-house belonging to an undivided family has been transferred to a person who is not a member of such family and such transferee sues for partition, the Court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as it thinks fit and direct the sale of such share to such shareholder, and may give all necessary and proper directions in that behalf.

(2) If in any case described in sub-section (1) two or more members of the family being such shareholders severally undertake to buy such share, the Court shall follow the procedure prescribed by sub-section (2) of the last foregoing section.

Represent-
ation of
parties under
disability.

5. In any suit for partition a request for sale may be made for an undertaking, or application for leave, to buy may be given or made on behalf of any party under disability by any person authorized to act on behalf of such party in such suit, but the Court shall not be bound to comply with any such request, undertaking or application unless it is of opinion that the sale or purchase will be for the benefit of the party under such disability.

Reserved
bidding and
bidding by
shareholders.

6. (1) Every sale under section 2 shall be subject to a reserved bidding, and the amount of such bidding shall be fixed by the Court in such manner as it may think fit and may be varied from time to time.

(2) On any such sale any of the shareholders shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purchase-

money or any part thereof instead of paying the same as to the Court may seem reasonable.

(3) If two or more persons, of whom one is a shareholder in the property, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the shareholder.

7. Save as hereinbefore provided, when any property is directed to be sold under this Act, the following procedure shall, as far as practicable, be adopted, namely :—

Procedure to be followed in case of sales.

(a) if the property be sold under a decree or order of the High Court of Calcutta, Madras or Bombay in the exercise of its original jurisdiction, or of the Court of the Recorder of Rangoon, the procedure of such Court in its original civil jurisdiction for the sale of property by the Registrar ;

(b) if the property be sold under a decree or order of any other Court, such procedure as the High Court may from time to time by rules prescribe in this behalf, and until such rules are made the procedure prescribed in the Code of Civil procedure in respect of sales in execution of decrees.

8. Any order for sale made by the Court under section 2, 3 or 4 shall be deemed to be a decree within the meaning of section 2 of the Code of Civil Procedure.

Orders for sale to be deemed decrees.

9. In any suit for partition the Court may, if it shall think fit, make a decree for a partition of part of the property to which the suit relates and a sale of the remainder under this Act.

Saving of power to order partly partition and partly sale.

10. This Act shall apply to suits instituted before the commencement thereof, in which no scheme for the partition of the property has been finally approved by the Court.

Application of Act to pending suits.

THE law in force regarding the Partition of Estates in the Provinces subject to the Lieutenant-Governor of Bengal is contained in Act VIII (B.C.) of 1876 only.

ACT VIII (B.C.) OF 1876.

(Received the assent of the Lieutenant-Governor on the 26th August 1876, and of the Governor-General on the 18th September 1876).

AN ACT TO MAKE BETTER PROVISION FOR THE PARTITION OF ESTATES.

Preamble. WHEREAS it is expedient to consolidate and amend the law relating to the partition of estates : It is enacted as follows :—

PART I.

PRELIMINARY.

Short title. 1. 'This Act may be called the "Estates' Partition Act, 1876."

Local extent. It extends to the territories for the time being under the administration of the Lieutenant-Governor of Bengal ;

Commencement. And it shall come into force from the date on which it may be published in the *Calcutta Gazette* with the assent of the Governor-General, which date is hereinafter referred to as the commencement of this Act.

Laws repealed. 2. On the commencement of this Act, the Regulations and Acts specified in the schedule hereto annexed, to the extent mentioned in the third column thereof, shall cease to have effect in the territories subject to the Lieutenant-Governor of Bengal, save so far as they repeal or modify any other Regulations or Acts, and save so far as regards the partition of any estate which shall be pending at the time of the said commencement.

The partition of any estate which shall be pending at the time of the commencement of this Act shall (except as provided in the next succeeding section) proceed and be completed in the same manner as if this Act had not been passed.

NOTE.—Where several steps had been taken to promote a butwarra, and the Collector decided that he would not bring the butwarra under section 3, the Board held that the proceedings were to be completed under the old law under this section. (Board's Proceedings of 29th June 1878, No. 239, Collection 1, File 37).

3. The provisions of this Act, so far as they relate to the continuation of a partition from the point which it has reached, or to the staying of the partition of an estate, or to striking a partition case off the file, may be applied, at the discretion of the Collector, in all cases of partition of estates pending at the time of the commencement of this Act; provided that, before applying such provisions to the continuation of a partition, the Collector give due notice in each case to the parties concerned that such provisions will be applied.

Certain provisions of Act applicable to partition cases pending at the time of its commencement.

NOTE 1.—Four butwarra cases were instituted in July 1876, *i.e.*, several months prior to the date on which Act VIII (B.C.) of 1876 came into force (which was on the 4th October 1876 under the 3rd clause of section I of the Act). During these months several steps were taken to promote the butwarra. It may specially be noticed that on the 5th August 1876 both parties (the two shares being equal) applied to the Collector to have the estate divided under section 22 of Regulation XIX of 1814 on the basis of a former partition measurement made in 1858. The Collector on the 16th November referred to the butwarra proceedings already taken, and decided under section 2 to carry out the butwarra under the old law, instead of bringing it under the new Act by issuing a notice under section 3 to the parties as he might have done. When the papers were submitted for the Commissioner's confirmation, that officer quashed the proceedings, ordering that the partition should be made under the new Act. On appeal the Board held that (a) as the Collector did not bring the case under the new Act by issuing a notice as required by this section, and as he had properly treated the case as pending at the time of the commencement of the new Act, he was right in completing the proceedings under the old law; and that (b) inasmuch as the commencement of the butwarra was considered, under the old law, to be from the date of the application, there having been no such provision in the old law as section 31 of the new Act, section 5 did not apply to the Collector's order of the 16th November 1876. (Board's Proceedings of 29th June 1878, No. 239, Collection 1, file 37).

NOTE 2.—See also note 1 to section 11.

4. In this Act—unless there be something repugnant in the subject or context—

Interpretation clause.

(i) "Amin" means a person who is appointed by the Collector or Deputy Collector to make any measurement, survey, or local inquiry, or to prepare the papers showing the result of any measurement, survey, or local inquiry:

(ii) "Applicant" means any person who has applied to the

"Applicant."

Collector under the provisions of this Act for the separation from the parent estate of lands representing his interest in such parent estate, and for the assignment to him of such lands as a separate estate liable for a demand of land revenue distinct from that for which the parent estate is liable.

"Assets of land."

(iii) "Assets of land" include the rental of the land with respect to which the expression is used, and all profits derived by the proprietors out of such land from rights of pasturage, forest-rights, fisheries, and all other legal sources.

"Assets of an estate."

(iv) "Assets of an estate" mean the assets of all land included in an estate.

"Board."

(v) "Board" means the Board of Revenue for the provinces for the time being subject to the Lieutenant-Governor of Bengal.

"Chapter."

(vi) "Chapter" means a chapter of this Act.

"Deputy Collector."

(vii) "Deputy Collector" includes any Assistant Collector, Deputy Collector, or Sub-Deputy Collector whom the Collector may appoint (as he is hereby empowered to do) to effect a partition and allotment of assessment under this Act, or to conduct any of the proceedings connected with such partition and allotment.

"Estate."

(viii) "Estate" means all lands which are borne on the revenue-roll of a Collector as liable for the payment of one and the same demand of land revenue.

"Joint undivided estate."

(ix) "Joint undivided estate" means all lands which are borne on the revenue-roll of a Collector as liable for the payment of one and the same demand of land revenue, and of which two or more persons are proprietors.

"Land."

(x) "Land" does not include the houses and building standing thereon.

"Lieutenant-Governor."

(xi) "Lieutenant-Governor" means the Lieutenant-Governor of Bengal for the time being, or the person acting in that capacity.

"Parent estate."

(xii) "Parent estate" means any estate for the partition of which proceedings may be in progress under this Act, or of which the partition may have been effected under this Act.

"Proprietor."

(xiii) "Proprietor" includes every person who is in possession of any estate under partition, or of any portion of such estate, or of any interest in such estate, or in any part of such

estate as owner thereof, whether such person be or be not a recorded proprietor of the estate.

(xiv) "Recorded proprietor" means a person whose name is registered on the Collector's General Register of revenue-paying lands as proprietor of an estate, or of any share or interest therein. **"Recorded proprietor."**

(xv) "Section" means a section of this Act. **"Section."**

(xvi) "Separate estate" means any distinct estate which may be formed by the partition of a parent estate under this Act, or for the formation of which proceedings may be in progress under this Act. **"Separate estate."**

(xvii) "The Collector" means the Collector of the district on the revenue-roll of which the estate under partition, or which it is proposed to bring under partition, is borne, and includes any officer whom the Board may generally vest (as it is hereby empowered to do) with the powers of a Collector under this Act, and to whom the Collector of the district has, with the sanction of the Commissioner, delegated (as he is hereby empowered to do) any of his duties and functions in respect of the partition of any estate; and any officer whom the Board may specially vest (as it is hereby empowered to do) with the powers of a Collector for purposes of any partition under this Act. **"The Collector."**

(xviii) "The Commissioner" means the Commissioner of Revenue to whom the Collector engaged in making the partition is subordinate. **"The Commissioner."**

5. All partitions of estates which shall be ordered to be made after the commencement of this Act, shall be made under the provisions of this Act, and no such partition made otherwise than under this Act shall relieve any lands from liability to Government for the total demand of land revenue assessed upon the estate of which they form a part. **Future partitions to be made under provisions of this Act.**

NOTE.—In a case in which several steps had been taken to promote a butwarra instituted under Regulation XIX of 1814, and which the Collector decided not to bring under the new Act (as he might have done by issuing a notice under section 3), the Board held that the proceedings previous to the 4th October 1876 (the date of the commencement of the Act) constituted it a butwarra case pending under the old law, so that an order of the Collector, dated the 16th November 1876, did not make this section applicable to the case. (Board's Proceedings of 29th June 1878, No. 239, Collection 1, File 237).

Revenue to be assessed on each separate estate.

Definition of rental.

6. The amount of land revenue assessed on each separate estate shall bear the same proportion to the whole amount of land revenue for which the parent estate was liable, as the assets of such separate estate bear to the whole assets of the parent estate.

7. Except as hereinafter otherwise expressly provided, the average of the amount of rent which was payable for any land by the cultivating ryots during the three years immediately preceding the year in which proceedings are taken under this Act for the partition of the estate shall, for the purposes of this Act, be deemed to be the rental of such land ;

and if any land is not let, but is held and occupied directly by the proprietors or any of them, the annual rent for which such land might reasonably be expected to let shall be deemed to be the rental of such land.

Exception 1.—If the rent payable by the cultivating ryots on account of any land shall have been determined by any Court of competent jurisdiction, or shall have been altered with the consent of the said ryots at any time during the said three years, the amount so determined, or the amount to which the rent may have been so altered, may, if the Collector think proper, be deemed to be the rental of the land.

Exception 2.—If any land is held on a permanent tenure which was created by all the proprietors of the estate, and which by any law for the time being in force is protected against the purchaser at a sale for arrears of revenue, the rent payable by the holder of such tenure shall be deemed to be the rental of such land.

Exception 3.—If any land is held on a tenure which, although not protected as aforesaid, is admitted by all the recorded proprietors of the estate to be a permanent tenure created by all the proprietors of the estate, subject only to the payment of an amount of rent fixed in perpetuity, and of such nature that the rent thereof is not liable to be enhanced, under any circumstances by the proprietors of the said estate, or any person deriving his title from such proprietors, the rent payable by the holder of such tenure (whether he be known as talukdar, patnidar, mukartaridar, or by any other designation) shall be deemed to be the rental of such land.

Exception 4.—If any land be unoccupied, such amount as the Collector may determine, with reference to all the circumstances of the case, shall be deemed to be the rental of such land.

PART II.

OF THE RIGHT TO CLAIM PARTITION.

8. Except as hereinafter otherwise provided, every recorded proprietor of a joint-undivided estate, who is in actual possession of the interest in respect of which he is so recorded, is entitled to claim a partition of the said estate, and the separation therefrom and assignment to him as a separate estate of lands representing the interest of which he is in such possession; provided that, and as far only as such partition, separation, and assignment can be made in accordance with the provisions of this Act.

Who entitled
to claim
partition.

Any two or more such recorded proprietors may claim that lands representing the interests of all such claimants may be formed into one separate estate, to be held by them as a joint-undivided estate; and every provision of this Act which applies to an applicant for partition shall apply to any two or more persons making such joint claim.

NOTE 1.—The Partition Act clearly contemplates more than the mere record of the fact of possession on the part of an applicant for partition. He must be in actual possession of the interest in respect of which he is so recorded. If the fact of registration in the Collector's books were by itself to be accepted as sufficient evidence of possession to entitle an applicant to claim partition, it would have been unnecessary for the law to declare (as it does) that partition may be claimed by a recorded proprietor who is in actual possession of the interest in respect of which he is so recorded. (Board's Proceedings of 15th January 1887, No 106, Collection 7, File 4).

NOTE 2.—In the year 1226 F (1819) a fourteen-anna eight-gundas share of a certain mouzah was permanently settled. The remaining one-anna twelve-gundas share was permanently settled in 1861. This share was sold for arrears of Government revenue in 1873, and purchased by the plaintiff, who subsequently applied to the Collector for partition under the Btwarra Act. The Collector refused to partition upon the ground that the Act was not applicable to the partition of a mouzah held jointly by the proprietors of two separate estates. The plaintiff then brought the present suit, so which he made the Collector a party, to obtain a declaration that he was entitled to have his share separated from the fourteen-anna eight-gundas share by metes and

bounds, and also for a decree directing a partition of the whole mouzah into two parts. "

Held, that so far as the plaintiff on the one hand and the owners of the fourteen-anna eight-gundas share on the other, were concerned, the mouzah could be partitioned, but that such partition would not be binding upon the Government unless by consent.

(Ajoodhya Persad *versus* Collector of Durbhunga, 9, I. L. R., Calc., page 419).

NOTE 3.—In 1851 an estate was brought under butwarra under the provisions of Regulation XIX of 1814. At such butwarra a portion of the estate being land covered with water and unfit for cultivation was not divided, but left joint amongst all the co-sharers, the land revenue payable on account of the whole estate being apportioned amongst the several estates into which the portion divided was split up. Subsequently, on the portion remaining joint becoming dry and fit for cultivation, an application was made by one of the co-sharers to the Collector to partition the same under the provisions of Bengal Act VIII of 1876, but that officer refused to do so, on the ground that the land "did not bear an assessed revenue and was not shown in the towji."

In a suit brought under the above circumstances to compel the Collector to make the partition, and in the alternative to have it made by the Civil Court, *Held*, that, though the reason given by the Collector for refusing was an erroneous one, he was not bound to make the partition under the provisions of Bengal Act VIII of 1876, as the land in suit was not liable for the payment of one and the same demand of land revenue, and was therefore not a joint undivided estate within the terms of section 4, clause (9) of that Act.

Held, also, that the word "estate," as used in section 265 of the Civil Procedure Code, must not be construed in the same limited and defective sense in which it is used in Act VIII of 1876, but must be taken to be there used in its ordinary signification, and that consequently the plaintiff was entitled to a decree for partition under the provisions of that section. Chunder Nath Nundy, *versus* Hur Narain Deb (1) approved. (The Secretary of State for India in Council *versus* Nundun Lall, 1884 I. L. R., 10, Cal., page 435).

Partition according to interest.

9. (a) If the interest of any recorded proprietor who is entitled to claim partition as aforesaid is an undivided share in an estate held in common tenancy, such person shall be entitled to have assigned to him^a as his separate estate lands of which the assets shall bear the same proportion to the assets of the parent estate as his undivided share in the parent estate bears to the entire parent estate.

(b) If the interest of such recorded proprietor is the pro-

proprietary right of certain specific mouzahs or lands forming part of the parent estate, and held by him in severalty, he shall be entitled to have assigned to him as his separate estate the said mouzahs or lands.

(c) If the interest of such recorded proprietor consists of an undivided share held in common tenancy in certain specific mouzahs or tracts forming part of the parent estate, but not extending over the whole area of the parent estate, he shall be entitled to have assigned to him as his separate estate lands situated within such specific mouzahs or tracts, of which the assets shall bear the same proportion to the assets of such specific mouzahs or tracts as his undivided share in such specific mouzahs or tracts bears to the entire mouzahs or tracts.

Provided that, if the interest of such recorded proprietor consists of such undivided share in more than one mouzah or tract, he shall not be entitled to have lands assigned to him in every such mouzah or tract, but the Collector may assign to him as his separate estate lands situated in any one or more of the said mouzahs or tracts, provided that the assets of such lands are in proportion to the aggregate of the interests which he holds in all such mouzahs or tracts.

(d) If such recorded proprietor holds in the parent estate more than one of the kinds of interest specified in this section, lands shall be assigned to him as far as possible in accordance with the principles above laid down.

NOTE TO CLAUSE (c)—In the case of an estate made up of lands or shares in five different mouzahs, application for butwarra having been made by the recorded proprietor of a share in the share of one of the mouzahs, and objection having been taken thereto, it was held by the Board that an interest in one of the five mouzahs, consisting of an undivided share in the mouzah which was held jointly with the proprietors of four other estates, did not come under this clause. As the basis of all partition proceedings is the division of the lands which are borne on the Collector's rent-roll as liable for the payment of one and the same demand of land revenue, it was held that by reason of the existence of such an interest as that above described (viz., in a mouzah held jointly with estates other than the estate under partition) no partition was feasible. (Board's Proceedings of 20th February 1886, No. 97, Collection 2, File 630.)

10. Notwithstanding anything hereinbefore contained, no Life estate. person having a proprietary interest in an estate for the term

of his life only shall be deemed to be a person entitled to claim partition under this Act.

NOTE 1.—In a case the Collector rejected the application of a Hindu widow for the partition of her share in a joint undivided estate on the ground, among others, that as she held a proprietary interest in the estate for the term of her life only, she was debarred under the provisions of section 10 of the Act from claiming a partition of her share.

On the widow's appeal against the Collector's orders, the Commissioner held that the proper course to pursue in the case was to give the reversionary heirs permission to join with the widow in the petition for partition. He then went on to discuss the question who were the reversionary heirs, and having decided that they were the daughters and daughter's children of the widow, and not the brothers and nephews of her deceased husband, he returned the case to the Collector with directions to proceed with the partition if the reversionary heirs joined in the application. The Board were of opinion that the orders issued by the Commissioner were erroneous and must be set aside. They observed:—"The terms of section 10 of the Act which disqualify any person having a proprietary interest in an estate for the term of his life only, from claiming a partition are absolute. Apart also from the fact that the revenue courts have no jurisdiction to enquire into or determine questions of right or inheritance, it is to be observed that the only persons who can claim a partition, or who can be recognized by the revenue courts, are registered proprietors who are in actual possession."

The appeal was accordingly decreed, and the orders originally passed by the Collector rejecting the application for partition were confirmed. (Board's Proceedings of 30th July 1881, No. 201, Colln. 1576, File 1)

NOTE 2.—A Hindu widow who has succeeded to a share in a revenue-paying estate as heir to her deceased husband is not a person having a proprietary interest in an estate for the term of her life only, within the meaning of section 10, Bengal Act VIII of 1876. Even if she were, a civil court would not be debarred from decreeing partition of a revenue-paying estate at her instance if a proper case for the passing of such a decree be made out by her.

(*Mohadeo Kooer versus Haruck Narain and others*, 1883, I.L.R., 9, Calc., page 244.)

NOTE 3.—A Hindu widow and a recorded share-holder of an estate having an adopted son applied to have her share of the estate partitioned off. The application to the Collector was opposed by one of the co-proprietors of the estate on the ground that her interest in the estate was one for life only, and that therefore under section 10 of the Act she was not entitled to claim a partition. The Collector held that with reference to the opinion expressed by the High Court in the case of *Mohadeo versus Haruck Narain* (IX, I. L. R., Calc., page 244), the widow was bound to establish in a civil court exceptional circumstances

justifying her application for partition. The Commissioner on appeal remanded the case with instructions that the partition should be allowed to proceed if the adopted son of the widow was of age and of sound mind, and there was no reasonable objection on his part. The Commissioner subsequently stopped the partitioned proceedings. The adopted son having given his consent, it was eventually held by the Board on appeal that as the name of the applicant was recorded in the Collector's register in respect of her share for the partition of which she claimed, and as her possession was not disputed and the interests of the heir presumptive were according to the terms of the decision of the High Court not injuriously affected by an order for partition, the appellant Hindu widow was entitled to the partition she claimed. (Board's Proceedings of 19th March 1886, No. 112, Collection 9, File 132.)

11. No application for the partition of a permanently-settled estate shall be admitted, and if the application shall have been admitted, no partition shall be carried out in accordance with such application, if the separate estate of any of the proprietors would be liable for an annual amount of land revenue not exceeding one rupee, until the proprietor of such separate estate agrees to redeem the amount of revenue for which his estate would be liable, by payment of such sum as the Lieutenant-Governor may fix with reference to the circumstances of such estate.

No partition of a permanently-settled estate allowed if separate estate liable for less than one rupee annual land revenue until proprietor agrees to redeem.

NOTE 1.—The provisions of this section were held not to apply to partition proceedings which were pending at the time of the commencement of this Act and were carried out under Regulation XIX of 1814 under section 2 of this Act, no notice having been given under section 3 of this Act to bring the partition under its provisions. It was ruled that the shareholders could not be compelled to redeem their shares of the Government revenue. (Board's Proceedings of 25th January 1879, No. 27, Collection 5, File 38, and of 19th March 1881, No. 126, Collection 5, File 599.)

NOTE 2.—Under this section no partition is to be allowed if the separate estate of any of the proprietors would be liable for a Government revenue of one rupee or less; and under the interpretation clause (3—XVI) of the Act, a separate estate is explained to mean any distinct estate which may be formed by partition.

No partition, then, can be allowed if the share of any of the applicants for partition would be liable to pay revenue of one rupee or less, or if the *ijmali* share of the estate belonging to proprietors who had not applied for partition were similarly circumstanced. There would be no obstacle to a partition if the several individual proprietors of an

ijmali share were each of them possessors of an interest representing a jumma of less than one rupee, provided that the whole aggregate of the *ijmali* share were liable to pay a revenue of more than one rupee. What remains as the *ijmali* share of the proprietors who have not applied for partition is a separate estate under the meaning of the Act.

A larger shareholder cannot be allowed to redeem the revenue of smaller shareholders without their consent. No such procedure is contemplated by the law.

(Board's proceedings of 17th September 1881, No. 211, Collection 1, File 1648, and of 27th June 1885, No. 187, Collection 5, File 362.)

Partition of an estate in which private division has been made not to be made, except on joint petition of proprietors or on order of Civil Court.

12. Whenever a division of the lands of any estate has been made by private arrangement of the proprietors thereof, and in accordance with such arrangement each proprietor is in possession of separate lands held in severalty as representing his interest in the estate, no such estate shall be brought under partition, and no partition of such estate shall be made under this Act otherwise than on a joint petition presented under section one hundred and one or section one hundred and five by all the proprietors thereof, unless such partition shall have been ordered to be made by a Civil Court.

NOTE 1.—An estate was brought under partition by an application of some of its proprietors. The proprietors of another share objected that, there having been a previous private partition, the butwarra in progress was inadmissible under section 12. The Deputy Collector who held a local enquiry found that the proprietors were in separate possession of specific lands, and that the partition could not proceed. This view was upheld by the Collector, but the decision was reversed by the Commissioner in appeal. On the hearing of the appeal before the Board, it was urged that separate possession was alone sufficient to prove the existence of a private arrangement. But the Board could not accept this view. They observed that what the law contemplated was a formal arrangement, agreed to by all the parties concerned, and followed by separate possession in accordance with the arrangement, and that the law very justly declared that when such an arrangement had been made the parties should not be permitted to resile from it. They further observed that it would be unjust that a proprietor, who had received specific lands under such an arrangement, and had allowed such lands to fall out of cultivation or otherwise to deteriorate, should be permitted to claim an interest in lands which had been improved by the good husbandry of his fellow-proprietors. The Board held that in such a case the first step would be to establish the existence of an agreement, and that although some of the proprietors might have entered into an informal understanding among themselves to occupy

certain lands and not occupy others, yet when the owners of other shares were not parties to the arrangement, and had not in any way recognized it, the partition was not barred by such an arrangement. (Board's Proceedings of 8th July 1882, No. 86, Collection 7, File 2123).

NOTE 2.—A partition can only be demanded, as of right, when each of the separate shares is made liable for an amount of Government revenue in proportion to its assets as compared with those of the undivided estate. When a private arrangement has been made among the proprietors, by which certain lands have been made liable for an amount of Government revenue not bearing the same proportion to the assets of such lands as the Government revenue of the entire estate bears to the assets of the whole estate, a partition may still be made if all the proprietors agree to it, and if the Collector is satisfied that the Government revenue is sufficiently secured. But no such partition can be made except on the joint application of all the recorded proprietors, and unless the Collector is fully satisfied that the interests of Government will not be endangered (Board's Proceedings of 30th September 1882, No. 334, Collection 7, File 20.)

NOTE 3.—Certain proprietors representing altogether a nine-annas share in an estate applied for a partition of their shares. Subsequently, the owners of a two-annas share also applied to have their share separately assessed and demarcated. Their applications were opposed on the ground that a private partition of the estate having been previously made in the year 1226 Fusli, the present partition could not be made with reference to the provisions of the present butwarra law. The Deputy Collector in immediate charge of butwarra proceedings considered that the division of 1226 was a bar to further proceedings. The Collector took the opposite view. The Commissioner on appeal held that a private butwarra had undoubtedly taken place, but he admitted the force of the technical objections raised on behalf of the respondents that, as a portion of the lands, viz., some 17 bighas were held ijmalī, and as the several shareholders under the private partition were not in separate possession of the entire lands representing their interests, the private partition was, with reference to the terms of section 12, no bar to the proceedings, and he in consequence confirmed the Collector's order allowing the butwarra to proceed. On appeal the Board upheld the Commissioner's order. They held that, though the butwarra of sixty years before into two 8-annas shares had taken place, it had clearly been superseded by some subsequent arrangement under which the proprietors were in possession, and admittedly holding shares representing 9, 2, 5, annas. Under these circumstances, it could not be said in the terms of this section that the private arrangement of 1226 Fusli was in force. They, however, did not attach much weight to the objections raised regarding the 17 bighas of land which were admittedly always held ijmalī, as, for special reasons, tanks and other special plots

of land are frequently retained ijmali (Board's Proceedings of 30th December 1882, No. 140, Collection 1, File 1996).

NOTE 4.—The private partition of an estate, such as that contemplated by this section, having taken place, it was held to be binding on the purchaser of a portion of one of such separated estates, as he must have been well aware at the time of his purchase of the existence of a private partition between his vendor and other co-proprietors. He could not therefore claim a partition under this Act. (Board's Proceedings of 30th January 1886, No. 58, Collection 1, File 67).

NOTE 5.—The wording of this section shows that it contemplates the objection being taken before an estate has been brought under partition, *i.e.*, before the proceeding referred to in section 31 has been recorded. (Board's Proceedings of 6th March 1886, No. 153, Collection 5, File 294).

NOTE 6.—The private partition contemplated in this section is one of the entire estate, and not merely of one village out of several. A division of only one village out of several, however complete the arrangement, would in no way operate as a bar to partition. (Board's Proceedings of 13th March 1886, No. 98, Collection 7, File 91).

NOTE 7.—The Board have on more than one occasion held that the partition referred to in this section as sufficient to bar proceedings for a butwarra under this Act must be of the most complete and formal description, that there must be a distinct demarcation of the lands of each recorded proprietor, and that, as required by the section itself, clear evidence must be forthcoming to show that each proprietor of the estate is in possession of lands severally representing his interest in the estate. (Board's Proceedings of 13th March 1886, No. 205, Collection 7, File 35).

NOTE 8.—An estate A consisted of two entire villages and a half share of another village B, the other half belonging to two other estates, C and D. The lands of the half share of B in estate A were demarcated by the survey from the half share of B belonging to the two other estates C and D. The proprietor of a seven-annas share in the half of the village B only of the estate applied for the partition of his share. The proprietor of the remaining one-anna objected that the partition could not proceed, inasmuch as by a private arrangement he was in separate possession of certain specific lands, and inasmuch as the jungle lands were held in common between the three estates. In appeal the Board observed that although it might be shown that the objector held a defined area of some 200 bighas, and there might be complete evidence of separate holding of this portion of the estate, yet this did not bring the case within section 12:—"The separate possession in severalty of one proprietor will not suffice: it is necessary that each proprietor should hold his lands in this manner, and moreover it has been more than once ruled by the Board that separate possession must be one by metes and bounds, each proprietor's share being clearly and fully defined. The case would seem to be one in which the terms of section 106 would apply." Thus

they held that the private arrangement in this case was not such as was contemplated in this section, and that this section was no bar to the partition proceedings. (Board's Proceedings of 1st May 1886, No. 160, Collection 7, File 262).

NOTE 9.—An estate was at first privately divided in two equal shares. After some years it was privately divided into six equal shares. After several years it was held by no less than 28 recorded proprietors. One of them having a one-anna interest applied for partition, and an objection was preferred that there had been a private partition which under this section would be a bar to a partition under this Act. The Board held that the circumstances having changed from the time of the original private partition, and even from the second, when there were six equal shares, the partition could proceed. It was clear, the Board held, that the division into six puttees did not represent the existing state of things on the property, and that it could not be said that, in accordance with this division, each of the present proprietors was in possession of separate lands representing his interest in the estate. (Board's Proceedings of 29th May 1886, No. 276, Collection, 7, File 472).

NOTE 10.—In an estate a partition of which was applied for under this Act, there had been a private partition of the lands, leaving 68 bighas held in ijmalī tenure. The case having come up to the Board in appeal, they observed that "as the Commissioner has rightly remarked, section 12 contemplates the division of all the lands of an estate, and separate possession of each proprietor or set of proprietors of lands representing their full interest in the estate. The exclusion of the 68 bighas is therefore fatal to the claim of a private partition having been effected." (Board's Proceedings of 4th September 1886, No. 46, Collection 7, File 197).

13. The Collector may refuse to admit an application for the formation of lands held in severalty into a separate estate; if, in consequence of such lands being intermingled with those held by other proprietors, the result of the partition would be to form out of a compact estate one or more estates consisting of scattered parcels of land in such a way as, in the opinion of the Collector, to endanger the safety of the land revenue, and the Collector may at any time refuse to proceed with a partition which would have such a result.

Under certain circumstances Collector may refuse to declare lands held in severalty to be a separate estate.

But a partition may be allowed in such a case if the recorded proprietors shall agree to such a distribution of land as shall make the estates formed by the partition reasonably compact.

Nothing in this section shall be understood to prohibit the partition into separate estates of a parent estate which before

such partition is not compact and consists only of scattered parcels of land. •

Interest alien-
ated with
special con-
dition as to
revenue
liability.

14. No proprietor who has alienated any portion of his interest in an estate, or in any specific lands of an estate, by private contract, with the condition that the transferee shall be liable in respect of the interest acquired by him to pay a specified amount or a specified share of the land revenue for which the estate is liable (such amount or share being other than the proportionate amount or the proportionate share for which such transferred interest if formed into a separate estate would be liable under the provisions of section six);

and no proprietor who has derived his title from any proprietor who has made any alienation as aforesaid,

shall be entitled to claim a separation under this Act of the interest which he continues to hold in the estate;

and no such transferee as aforesaid, and no person deriving his title from such transferee, shall be entitled to claim a separation of the interest which has been so acquired;

Provided that a separation of such interests may be made, if the parties concerned agree to waive the conditions of the contract as regards the proportion of revenue for which the transferor and transferee or their representatives respectively are liable, and to hold the estates which may be allotted to them respectively by the partition, subject to the payment of such amount of land revenue as may be assessed upon them respectively by the revenue authorities under this Act.

NOTE.—A certain share in an estate was sold, reserving certain rent-free and homestead lands. The purchaser, however, was made liable by the deed of sale for the revenue of the purchased share: by this was meant, not the revenue proportionate to the amount of land actually sold but the revenue proportionate to the share in the estate that was sold. The Board, agreeing with the Commissioner, held that under this section the partition could not proceed. (Board's Proceedings of 20th February 1886, No. 61, Collection 5. File 293).

Arrears of
revenue may
be realised
by sale of
parent estate,

15. Notwithstanding that a parent estate may have been declared to be under partition as provided in section thirty-one, any arrears of revenue accruing due on such estate before the date specified in the notice issued under section one hundred and twenty-three may be realised by sale of the parent estate as if such estate had not been declared to be under partition; and

if such sale takes place, the partition proceedings shall cease from the date thereof.

16. Nothing contained in the last preceding section shall be deemed to affect the provisions of sections 10, 11, 12, 13, or 14 of Act XI of 1859 (*an Act to improve the law relating to sales of lands for arrears of revenue*), or any provisions of any similar law for the time being in force in respect to the opening of separate accounts for different shares in an estate, and the protection afforded to such shares thereby.

Shares may be protected from liability for arrears under laws in force.

Provided that, if any share in any estate is sold for its own arrears of revenue while such estate is under partition in accordance with the provisions of this Act, such share shall be sold subject to the partition proceedings, which shall proceed as if no such sale had taken place; and the purchaser of the share sold may, from the date of such sale, exercise all the rights which the proprietor whose share he has purchased might have exercised, and shall be subject to all the liabilities to which such proprietor would have been subject in respect of the partition proceedings.

PART III.

OF THE APPLICATION FOR THE PARTITION; THE ADMISSION OF AN ESTATE TO PARTITION; AND THE DISCONTINUANCE OF THE PARTITION PROCEEDINGS AFTER SUCH ADMISSION.

17. All applications for partition shall be made to the Collector of the district on the revenue-roll of which the estate is borne, and shall be made in person, or by duly authorised agent, on paper bearing such stamp as may be required by any law for the time being in force.

Application for partition to be made to Collector of the district.

NOTE 1.—Revenue-paying estates must be partitioned by the Collector. They cannot be partitioned by metes and bounds by the Civil Court Ameen; and if the shares in such an estate are not separate estates, but are mere fractional shares of integral estates, they cannot be partitioned in the absence of the other co-sharers. (*Damooder Misser and another versus Sennabutty Misra* and others, 8. I. L. R., Calc. 537).

NOTE 2.—Partition of an estate paying-revenue to Government can-

not be effected in a civil court. (*Badri Roy and another versus Bhugwat Narain Dobe and others*, 8. I. L. R., Calc. 649).

Application to be signed, and certain particulars specified.

18. The application shall be signed by the applicant, and shall supply the following information in regard to the parent estate, so far as the particulars are known to the applicant or can be ascertained by him :—

(a) name of the estate ;

(b) number under which the estate is borne on the revenue-roll, and the revenue demand for which it is liable ;

(c) number under which the estate is borne on the Collector's General Register of revenue-paying lands ;

(d) name and address of every proprietor, whether recorded or unrecorded ;

(e) the character and extent of the interest of which each proprietor is in possession ;

(f) a specification of any lands held by all or any of the proprietors of the parent estate in common with all or any of the proprietors of other estates, and of the rights of such proprietors respectively in such lands.

Application must be accompanied by copy of rent-roll and statement of rents.

19. Subject to the provisions of section sixty-one, every application shall, if possible, be accompanied by a copy of the rent-roll of the estate, by a statement of the rents collected from such estate on behalf of the applicant during each of the three years immediately preceding such application, and by copies of any measurement papers of the estate which the applicant may have in his possession.

The said rent-roll, statement and measurement papers shall be attested by the patwaris of the villages, if any, and every such application, rent-roll, and statement shall be presented, subscribed, and verified as provided in section fifty-two.

If the applicant is unable to produce a rent-roll or statement as above required, he shall state the reason of such inability, and the name and address of the person who has in his possession the information necessary for the preparation of such rent-roll and statement, and the Collector may, if he shall think fit, require such person to produce such rent-roll and statement.

Collector may reject application

20. If the application does not fulfil the requirements of the three last preceding sections, the Collector may reject such application or may order it to be amended.

21. If in the opinion of the Collector the application fulfils the said requirements, and there appears to be no objection to making the partition, the Collector shall publish a notification of the application in the manner prescribed in section one hundred and thirty-four, and shall also cause copies thereof to be posted up at the Court of the Judge of the district, at the court of every Munsif and Sub-divisional Officer within whose jurisdiction, and at every police-station within the jurisdiction of which any lands appertaining to the estate are known to be situated, and shall invite any person claiming any proprietary right in the estate, who may object to the partition, to state his objection either in person, or by duly authorised agent, on a day to be specified in the notification, not being less than thirty or more than sixty days from the date of the publication of the notification on the estate.

Procedure of Collector on receipt of application.

22. Notice of the application shall also be served in the manner prescribed by section one hundred and thirty-five on such of the recorded proprietors of the estate as shall not have joined in the application, and on any other proprietor who may have been named in the application.

Notice to proprietors who have not joined therein.

23. If any objection be made to the partition by any person claiming a proprietary right as aforesaid on or before the day specified in the notification published under section twenty-one, or at any subsequent time if it shall seem fit to the Collector to admit such objection, and the Collector, on consideration of such objection, shall be of opinion that there is good and sufficient reason for rejecting the application, he may reject the same, and in that case shall record the grounds of such rejection.

In case of valid objection being made within time allowed, application may be refused.

NOTE — Patnidars cannot be considered as persons claiming a proprietary right who are entitled to object under this section, but a recorded part-proprietor of a mouzah, a portion of which mouzah also formed a part of the estate under batwarra, so that the name of such proprietor would be entered in the application under section 18 (f), was held to be entitled to object. (Board's Proceedings of 20th February 1886, No 97, Collection 2, File 630).

24. If the objection raises any question of the extent of interest or of right or title as between any applicant and any other person claiming to be a proprietor of the parent estate, and if it shall appear to the Collector that such question has not been already determined by a Court of competent jurisdiction

Procedure when objection raises any question of title or right.

tion, the Collector may hold such inquiry as he may deem necessary into the objection, and, if he be satisfied that the applicant is in possession of the extent of the interest for the separation of which he has applied, may, instead of rejecting the application as provided in the last preceding section,

(a) direct that the partition proceedings shall proceed for the purpose of forming and assigning to the applicant a separate estate in accordance with the extent of interest claimed by him in the parent estate; or

(b) direct that such proceedings be postponed for four months.

When Collector to resume proceedings.

25. At the expiration of the said four months, the Collector shall resume the proceedings, unless the person who has made the objection, or some other person, shall have obtained an order from a Civil Court directing that such proceedings be stayed, or shall be able to show that a suit has been instituted before such Court to try some question, of such nature that the Collector shall think fit to stay the proceedings until the question shall have been finally decided, or until the proceedings in such Court in respect thereof shall have terminated.

Suit in Civil Court when not to affect proceedings taken under this Act.

26. No suit instituted in a Civil Court by any person claiming any right or title in the parent estate, after the lapse of four months from the issue of an order of the Collector under clauses (a) and (b) of section twenty-four, or after the lapse of four months from the issue of an order of the Collector under section thirty-one declaring the estate to be under partition, shall avail to stay or affect the progress of any proceedings which shall have been taken under this Act for the partition of an estate; and all rights which may be conferred on any person by the final decree in such suit shall be subject to such proceedings in the manner hereinafter provided.

Decree made while partition proceedings are in progress.

27. Every decree passed in such suit after the parent estate shall have been declared to be under partition as provided in section thirty-one, but before the date specified in the notice under section one hundred and twenty-three, shall be made in recognition of the proceedings then in progress under this Act for the partition of such parent estate, and shall be framed in such manner that the provisions of such decree

may be applied to, and may be carried out in reference to, the separate estate which the Collector in his proceeding under section thirty-one shall have ordered to be formed out of the parent estate ;

and if the effect of any such decree be to declare any person or body of persons entitled to any extent of interest in such parent estate in excess of the extent of interest which the Collector in the said proceeding has declared to be held by such person or body of persons, such decree shall specify, separately in respect of every proprietor or body of proprietors of whose interests the Collector has separately specified the extent in the said proceeding, the proportion of such excess which such person or body of persons is entitled to recover from every such proprietor or body of proprietors ;

and every person or body of persons so declared entitled to recover any extent of interest from any such proprietor or body of proprietors shall, for the purposes of the partition proceedings, be deemed to have the same rights, and to be subject to the same liabilities, as a person who has acquired such extent of interest from such proprietor or body of proprietors by private purchase after the estate was brought under partition under section thirty-one, and on the date on which the decree was passed ;

and such person or body of persons may apply, as in this Act provided, for the separation and assignment to him, or them, of the lands representing the extent of interest so acquired ;

and such application shall be dealt with as provided in section thirty-two.

28. Every decree passed after the date specified in the notice under section one hundred and twenty-three in a suit which was instituted as mentioned in section twenty-six, shall be made in recognition of the partition proceedings, and shall be framed in such manner as to give effect to such division of the parent estate into separate estates as shall have been made by the Collector, and not to disturb such division ; and if the effect of any such decree shall be to declare any person or body of persons to have been entitled to any extent of interest in the parent estate in excess of the extent of interest which is repre-

Decree made
after partition
proceedings
completed.

sented by the separate estate assigned to such person or body of persons by the Collector in the partition proceedings, such decree shall specify, separately in respect of the proprietor or joint proprietors of every separate estate formed by the partition, the proportion of such excess of interest which such person or body of persons is entitled to recover from such proprietor or joint proprietors; and every person or body of persons so declared entitled to recover any extent of interest from the proprietor or joint proprietors of a separate estate shall be entitled to recover such extent of interest out of the separate estate which has been assigned to such proprietor or joint proprietors, and out of such separate estate only;

and every such decree as aforesaid shall be executed by placing the person or persons so declared entitled to recover in the position of a recorded joint proprietor or recorded joint proprietors of such separate estate, holding the same as a joint undivided estate in common tenancy with the proprietor or joint proprietors to whom such separate estate was assigned by the Collector in the partition proceedings, the extent of the interest of the joint proprietors respectively in such estate being such as is declared in the aforesaid decree.

Civil Court
may order
partition.

29. Subject to the provisions of section eleven, a Civil Court may at any time direct the Collector to assign to any person lands representing a specified interest in any estate, or in any specified village or tract of land in an estate to be held by such person as a separate estate, or to divide off from any estate any specified villages or lands, and to assign them to any person to be held as a separate estate, provided that an application for such partition and separation shall be presented by such person as required by sections seventeen, eighteen, and nineteen; but no Civil Court shall in any case specify the amount of revenue for which any separate estate which it may direct to be formed under the provisions of this section shall be liable.

Collector to
assess land
revenue in
accordance
with this Act.

30. The Collector shall assess the land revenue on every such separate estate in accordance with the provisions of this Act, and no Civil Court shall direct the Collector to carry out a partition otherwise than in accordance with the provisions of this Act.

31. If no objection be made within the time allowed under section twenty-one to an application for partition, or when all objections have been disposed of, and if the Collector has no reason to believe that any obstacle exists to his making the partition as applied for, he shall direct that the application be admitted, and record a proceeding declaring the estate to be under partition, for the purpose of forming and assigning to the applicant a separate estate.

Collector may declare the estate to be under partition.

In such proceeding the Collector shall declare the extent of interest in the parent estate which he finds to be held by the applicant or joint applicants ;

and, if more than one separate application for separation shall have been made and admitted, the extent of interest which he finds to be held by every separate applicant or body of joint applicants respectively ;

and also the extent of interest which remains to any recorded proprietor, or to any number of recorded proprietors who are not applicants ;

and shall order that lands proportionate to the interest so declared to be held by each applicant, or body of joint applicants respectively, shall be formed into a separate estate, to be assigned to such applicant or body of joint applicants ;

and that lands proportionate to the interest so declared to remain to the recorded proprietor, or the number of recorded proprietors who are not applicants, shall be left forming a separate estate.

32. If at any time after the Collector has made an order for partition under the last preceding section, any recorded proprietor in the estate, other than the original applicant, shall apply for the separation of his share, the Collector may either order that the proceedings for effecting such separation shall be carried on simultaneously with those for separating the share of the original applicant, or, if he consider that such a course would entail delay in the completion of the original proceedings, he may order that no action shall be taken on such subsequent application until after the proceedings for the separation of the original applicant's share shall have been completed.

Subsequent application for separation of another share.

In the latter case all or any of the rent-rolls, measurements,

and other papers which were used in the separation of the original applicant's share, may be used, as far as they are applicable, in the partition for which subsequent application has been made.

Collector may refer application for partition to any Deputy Collector.

33. The Collector may refer any application for partition to a Deputy Collector for the purpose of making any inquiries and doing anything required by this Part: provided that every order—

(a) rejecting an application under section twenty-three ;

(b) directing, under section twenty-four, that the partition shall proceed, or shall be postponed ;

(c) directing, under section thirty-one, that an application for partition be admitted, and declaring an estate to be under partition ;

(d) made under the first clause of the last preceding section ;

(e) appointing a Deputy Collector under the next succeeding section to carry out the partition ;

shall be passed by the Collector and not by any Deputy Collector.

As soon as estate declared to be under partition, Collector may appoint Deputy Collector.

34. As soon as the Collector has declared an estate to be under partition as provided in section thirty-one, he may appoint a Deputy Collector to carry out the partition, and all or any of the proceedings necessary thereto.

Partition may be stayed if parties so desire. Recovery of costs.

35. If at any time after an order shall have been passed for making a partition, all the recorded proprietors of the estate shall present a petition to the effect that they do not wish the partition to proceed, the Collector may, on the report of the Deputy Collector or otherwise, strike the partition case off the file, on payment by the proprietors of all costs and expenses incurred in and about such partition ; and any such costs and expenses which shall not already have been levied as provided in section thirty-nine or section forty, shall be levied in proportion to the shares of the respective proprietors.

NOTE.—From this section it is clear that a partition case can only be struck off the file by a Collector on a petition from all the recorded proprietors that they do not wish the partition to proceed. The power which is reserved to a Commissioner under section 36 to quash a partition must be exercised at the Commissioner's discretion with reference to the circumstances of each case. (Board's Proceedings of 17th September 1881, Collection 1, File 1648.)

36. If at any time after an order shall have been passed for making a partition, it shall appear from information which was not before the Collector at the time the partition was ordered or otherwise, that any sufficient reason exists why the partition should not be proceeded with, the Commissioner may, on the report of the Collector or otherwise, after issuing a notice calling on the persons interested to show cause why the partition should not be struck off the file, and after considering any objections which may be made, order the partition case to be struck off the file; and in such case any costs and expenses of the partition which shall not already have been levied as provided in section thirty-nine or section forty shall be levied in proportion to the shares of the respective proprietors.

Partition may be stayed and proceedings quashed by Commissioner.

NOTE 1.—When an estate was entered under one number and one sudder jumma in the Government rent-roll, and the two mouzahs of the estate were jointly liable for the Government revenue, it was held that there was no legal obstacle to the application of the owner of an eight-annas share in one of the mouzahs for a butwarra of his share, and that the whole estate must be considered liable to measurement and assessment under the butwarra proceedings. It was added—"The identity of the separate villages must be considered as having become merged at the time of the permanent settlement in the common responsibility which they jointly share for the Government revenue of the entire estate. A butwarra can only be effected under section 6 of the Partition Act, and the separate and distinct manner in which the two mouzahs have been held by perfectly distinct proprietors offers no legal disability in the way of the completion of the butwarra." Whatever the early history of the mouzahs might have been (with regard to separate engagements), the fact to be regarded was that at the time of the butwarra they constituted a joint and undivided estate. The Board therefore reversed the Commissioner's order that the case should be dealt with under section 36. (Board's Proceedings of 8th November 1884, No. 248, Collection 1, File 247.)

NOTE 2.—In the event of legislation being undertaken, it has been reserved for consideration whether the powers vested in Commissioners under this section and section 40 should not be transferred to Collectors, subject to the safeguard that an appeal shall in each instance lie to the Commissioner (Board's proceedings of 19th May 1888, No. 230, Collection No. 7, File No. 420).

PART IV.

OF ESTABLISHMENTS FOR EFFECTING PARTITIONS AND OF THE
COST THEREOF.

Deputy Col-
lector may
appoint
officers for
making
measurement
of lands, &c.

37. For the purposes of this Act, the Deputy Collector may, with the approval of the Collector, and subject to any rules made in that behalf by the Board, appoint such establishments as may be required for making the measurement and survey of lands for ascertaining and recording the rates of rent, for making any other local inquiries, for the preparation of the papers, and for other matters in each case; and the Collector may appoint such peshkars or other superior officers as may be required to test the work of the amins and for the performance of similar duties; provided that the scale of remuneration of such officers, and the time for which they shall be employed, shall be sanctioned by the Commissioner.

Special estab-
lishments
may be
appointed.

38. In any district or division in which partitions may be so numerous or so extensive as to render necessary the appointment of special establishments in the office of the Collector or of the Commissioner, the Collector and the Commissioner may, with the sanction of the Board, appoint such establishments.

Cost of parti-
tion to be
levied from
proprietors in
accordance
with rules
laid down by
the Board.

39. As soon as possible after an estate has been declared to be under partition as provided in section thirty-one, the cost of making the partition shall be estimated, and the amount shall be levied from the proprietors in such instalments and at such times during the progress of the partition as may be fixed in accordance with any rules which the Board may make in that behalf.

If the amount first estimated is found insufficient, supplementary estimates may be made from time to time, and the required amount may be levied as above provided.

Apportion-
ment of costs.

40. The cost shall be apportioned on the proprietors of each share in proportion to their shares; but whenever it shall appear to the Commissioner that the partition proceedings have been unnecessarily delayed, and the cost of the partition enhanced by obstacles vexatiously put in the way of their comple-

tion by one or more of the proprietors, or by want of due diligence on the part of one or more of the proprietors, in carrying out any requisitions made upon him or them, the Commissioner may direct that such portion of the cost as he may think proper in excess of the amount proportionate to his or their share shall be levied from such proprietor or proprietors.

NOTE 1.—As the cost of a partition is regulated, not by the Government revenue or the gross assets or the net profits, but by the area (the maximum being Rs. 36 per 100 acres), it does not seem unreasonable that the area should be made the basis of determining the proportion of costs to be paid by each of the parties. If the circumstances of an estate render it impossible to apportion the expense of the partition in accordance with area, the apportionment should be made in accordance with the amount of the Government revenue payable on account of each of the shares into which it is proposed to divide the estate. (Board's Proceedings of 13th May 1882, No. 139, Collection 8, File 963).

NOTE 2.—See note 3 to section 36.

41. Whenever any local inquiry may be held by the Deputy Collector or any other officer, in consequence of an objection raised by any person to any record of measurements, rent-rolls, or other information which has been laid before the Deputy Collector, the Deputy Collector may declare the cost which has been incurred by such inquiry, and may direct that the entire cost so declared shall be paid by the person making the objection, or by any one of the proprietors, or that such cost shall be paid in such proportions as he shall think fit, by the said person and the proprietors or any of them, or that such cost be deemed a part of the general cost of making a partition as prescribed in section thirty-nine. •

Deputy Collector may declare cost of local inquiry.

42. Upon the completion of the partition, the Collector shall make an order declaring the total cost thereof. The account shall then be adjusted, either by returning to the proprietors any sums which they may have paid in excess of the total cost, or by levying from them in the manner provided in section one hundred and thirty-eight, if necessary, any sums remaining due. •

After completion of partition Collector shall declare total cost thereof.

43. Whenever it shall appear to the Lieutenant-Governor that in any district the work required to be done by Deputy Collectors in connection with partitions under this Act is so great that such work would, if concentrated in the hands of one or more Deputy Collectors, fully occupy the time of such one

Salary of Deputy Collectors when to be deemed part of cost of partition.

or more Deputy Collectors, the Lieutenant-Governor may make an order directing that the salary of such one or more Deputy Collectors, as the case may be, shall be recovered from the proprietors of estates under partition in such district as part of the cost of such partitions, and thereupon such charge as the Collector may think fit to make in respect of such salary shall in addition to the items mentioned in the last preceding section, be deemed to be a portion of the costs of every partition.

For the purposes of this section the salary of every Deputy Collector shall be deemed to be the amount of salary which is drawn by a Deputy Collector of the lowest grade.

NOTE.—If, while employed on partition work, a Deputy Collector is promoted to, or confirmed in, an appointment of which the pay is higher than that of a Deputy Collector of the lowest grade, and if his continued deputation to that work is considered necessary, the excess over the pay of a Deputy Collector of the lowest grade (Rs. 250) is to be paid by Government, and cannot be charged to the Estates' Partition Fund. (Board's Proceedings of 5th September 1885, No. 122, Collection 10, File 40).

What are
costs leviable
from pro-
prietors.

44. For the purposes of sections thirty-nine, forty, and forty-two, the costs of any partition shall be deemed to be—

(a) the cost of any establishments entertained for the partition under section thirty-seven, or such amount as the Collector may think proper in respect of the services of any such establishments which are entertained for the purposes of making partitions in the district;

(b) all contingent expenses incurred in and about the partition, and

(c) such portion of the cost of any establishment entertained under section thirty-eight as the Collector may order.

NOTE 1.—The cost of surveying instruments clearly comes within section 44 (b), as well as section 49 (b) of the Act, as all butwarra charges should be met by the proprietors of estates under partition, and not by Government. (Board's Proceedings of 15th March 1884, No. 150 Collection 10, File 68).

NOTE 2.—*To clause (b)*—This is a very general heading, and must be held to include travelling, leave and pension allowances, as well as all ordinary contingencies. In addition to their salaries, a charge "at the rate prescribed in Article 823 of the Civil Service Regulations is levied

on the salaries" (3-8-90) in the shape of partition fees, from the proprietors of estates under partition to meet the liability of Government for the leave allowances and pension of the Deputy Collectors employed under section 43 (whether members of the Subordinate Executive Service or not holding substantive appointments under Government or not in service of a pensionable nature), and of such members of their establishments as hold substantive appointments under Government. (Board's Proceedings of 4th September 1886, No. 240, Collection 10, File 295, and of 29th May 1880, No. 159, Collection 10, File 767, "and of 9th August 1890, No. 23, Collection 10, File 15.") 3-8-90.

45. Notwithstanding anything contained in the eight last preceding sections, the Lieutenant-Governor may direct that in any district a fund to be called the "Estates' Partition Fund" shall be formed, into which all sums levied from the proprietors of estates in respect of partitions of their estates shall be paid. Lieutenant-Governor may direct "Estates' Partition Fund" to be formed.

Whenever such a fund shall have been established in any district, all expenses of making partitions of estates in such district shall, except as hereinafter otherwise provided, be defrayed from such fund.

46. Whenever the Lieutenant-Governor shall have ordered an "Estates' Partition Fund" to be formed in any district, the charges leviable from the proprietors of any estate under partition may be estimated and levied according to the estimate in each case as provided in sections thirty-nine and forty, subject to final adjustment, as provided in section forty-two; or they may be levied according to a general scale of fees to be fixed by the Board. Procedure when Estates' Partition Fund formed in any district.

NOTE.—The fees or charges levied under this section and section 47 are to be credited to XXIII, "Miscellaneous" and not to "Miscellaneous Land Revenue." (Board's Circular Order No. 3 of June 1883.)

47. Such scale of fees shall be fixed as nearly as may be, so that the receipts and expenditure of the said fund shall balance one another, and shall be revised from time to time by the Board for that purpose. Scale of fees.

Such fees shall be levied from the proprietors in such instalments and at such times during the progress of the partition as may be fixed in accordance with any rules which the Board may make in that behalf, and the provisions of section forty shall be applicable to such fees.

NOTE.—See NOTE to section 46.

Abstract of
Estates' partition
Fund to be
published.

48. An abstract of the Estates' Partition Fund of each district made up to the end of each year shall be published in the *Calcutta Gazette*, and by being posted up at the office of the Collector of the district.

What costs of
partition
chargeable to
Estates' Partition
Fund.

49. For the purposes of sections forty-five, forty-six, and forty-seven, the expenses of making partitions in any district shall be deemed to be—

(a) the cost of all establishments entertained in the district under section thirty-seven ;

(b) all contingent expenses incurred in all partitions in the district ;

(c) the cost of any special establishment appointed in the office of the Collector under section thirty-eight ;

(d) such portion as the Commissioner may direct of the cost of any special establishment appointed in his office under section thirty-eight ;

(e) the salary of any one or more Deputy Collectors which the Lieutenant-Governor may have ordered under section forty-three to be recovered from the proprietors of estates under partition.

NOTE —See also NOTE to section 44.

Civil Court
may in cer-
tain cases
order parties
to pay ex-
penses incur-
red in divid-
ing an estate.

50. Whenever any Civil Court shall make a decree awarding or declaring any proprietary right in an estate, and shall require the Collector to make a partition of the estate, such Court may at the same time direct,

that the party or parties who may have withheld the right so decreed shall defray the whole of the expense which may be incurred in and about the partition, or the whole of the fees payable in respect of the partition under section forty-six,

or that the said expenses or fees shall be defrayed by all or any of the parties to the suit in which the decree was made in such proportions as the Court may, from a consideration of the particular circumstances of the case, deem equitable ;

Copies of all orders which the Court may pass under this section shall be transmitted to the Collector for his guidance, together with the precept which the Court may issue to him

requiring him to divide the estate; and the Collector shall levy the said expenses and fees from the parties in the proportion ordered by such Court in the same manner and by the same means as if the levy of such expenses and fees had been ordered by the Collector.

PART V.

OF THE PARTITION PROCEEDINGS UP TO THE ADOPTION OF A RENT-ROLL AND MEASUREMENT PAPERS.

51. As soon as the Collector shall have made an order under section thirty-one declaring an estate to be under partition, the Deputy Collector shall cause a notification to be published in the manner prescribed by section one hundred and thirty-four, and shall also cause copies thereof to be posted up at the Court of the Judge of the district in which any lands appertaining to the parent estate are known to be situated, and at the Court of every Munsif and of every subdivisional officer within the jurisdiction of whom, and at every police station within the jurisdiction of which, any such lands are known to be situated, intimating his intention to proceed with the partition, and requiring all the proprietors of the estate to produce before a certain date, being not less than forty days from the date of such notification, either jointly or separately, copies of their rent-rolls and statements of the rents collected during each of the three years next preceeding, and also copies of any measurement papers of the estate which may be in their possession.

As soon as estate declared to be under partition, Deputy Collector shall cause notification to be published.

A notice to the same effect shall also be served as provided in section one hundred and thirty-five on each proprietor of the parent estate.

The Deputy Collector may, on sufficient grounds for so doing being shown to his satisfaction, from time to time extend the period for producing any such return.

52. Every rent-roll, statement of rents collected, and measurement paper furnished to the Collector under this Act shall be presented by the person who is required to produce the same or by a duly authorised agent of such person who

Rent-roll filed by a proprietor to be subscribed and verified.

has a personal knowledge of the facts stated therein, and shall be subscribed and verified at the foot by such person or such agent in the manner following, or to the like effect :—

“I, A, B, do declare that this rent-roll (*statement or measurement paper*) is correct to the best of my knowledge and belief.”

If the rent-roll, statement or measurement paper shall contain any entry which the person making the verification shall know or believe to be false, or shall not believe to be true, such person shall be subject to punishment according to the law for the time being in force for the punishment of giving or fabricating false evidence.

Procedure if person required cannot produce rent-roll or statement.

53. If any proprietor who is required to produce any rent-roll or statement by notice as aforesaid is unable to produce such rent-roll or statement, he shall state to the Deputy Collector the cause thereof and the name and address of the person who has in his possession the information necessary for the preparation of such rent-roll and statement, and the Deputy Collector may, if he shall think fit, require such person to produce such rent-roll and statement.

Deputy Collector may order measurement of land and may test rent-roll.

54. The Deputy Collector may, if necessary, make, or may cause to be made, a measurement of all or any of the lands comprised in the estate, and may prepare or cause to be prepared a rent-roll, and may test or cause to be tested on the spot any rent-roll which has been produced as aforesaid, and may make or cause to be made any local enquiry which he may consider necessary.

NOTE.—At present measurement is ordinarily made by the native method by pole and chain only. A proposal came before the Board from a district in the Patna Division to introduce measurement by chain and compass. The Board considered that the change of system would be an improvement, but that it would probably also prove much more expensive than the ordinary method, and that the additional expense would be a heavy burden on the estates under partition. It was ultimately decided that, though it was at present inexpedient to adopt the proposal in full, yet when the existing amins have learnt the scientific system of measurement, they should be directed to adopt it, and that amins should in future be introduced who understand the scientific system. (Board's Proceedings of 10th October 1885, No. 314, Collection 7, File No. 546.)

55. Before proceeding or deputing the amin to the spot, the Deputy Collector shall publish a notification in the manner prescribed by section one hundred and thirty-four, requiring the several proprietors of the estate, their managers, and any other persons employed in the management of the land, or otherwise interested therein, to attend in person or by agent upon him, or upon the amin who is deputed to make the measurement or enquiry, for the purpose of pointing out boundaries and of affording such assistance and information as may be required for the purposes of this Act.

Deputy Collector to summon proprietors by proclamation to attend proceedings.

56. The Deputy Collector, and any amin or other person who is specially authorized in that behalf by the Collector, may, by a notice served as provided in section one hundred and thirty-five, require any proprietor or other person whose attendance may be required to attend before the Deputy Collector or amin who is making such measurement or enquiry within a specified time at any place for any of the purposes aforesaid.

Deputy Collector and amin may require attendance of proprietor or any other person.

57. If any objection be made to a measurement, map, or rent-roll prepared by the amin, or if for any other reason it seems desirable, the Deputy Collector shall, as soon as possible after completion of the amin's work, himself test, or shall cause to be tested on the spot, such measurement, map, and rent-roll, and may accept, amend, or reject the same or any of them. If the Deputy Collector shall deem it necessary, he may cause the work or any portion thereof to be done again.

Deputy Collector to test amin's work.

58. The Deputy Collector may examine any person on solemn affirmation in regard to the papers produced before him, whether by the proprietors, by the amin, or otherwise, and shall allow the parties concerned to put any necessary questions to such person.

Examination of the parties and their papers.

The Deputy Collector shall also allow any proprietor or other person interested to examine the papers so produced, and to take a copy of the same, and after such examination shall hear any objections which any of the persons interested may make in respect of such papers, and shall decide whether any, and (if any) which of the papers, as they stand, or with such modifications as he may think necessary, shall be accepted as correct for the purposes of the partition.

Power of Deputy Collector if proprietor fails to file rent-roll.

59. If any proprietor who has been required to produce a rent-roll or statement under section fifty-one, fails to produce the same after the imposition on him of a fine under section one hundred and thirty-seven for thirty days, or fails to state to the Deputy Collector the name and address of any person under section fifty-three, the Deputy Collector may declare that the said proprietor shall, for the purposes of the partition, be bound by such rent-roll as the Deputy Collector may adopt as the basis of the partition as hereinafter provided, and after such declaration any officer exercising authority under this Act may refuse to entertain any objection which such proprietor may make to such rent-roll.

Power of Deputy Collector, if person fails to produce rent-roll.

60. If any person who has been required to produce a rent-roll or statement under section fifty-three, shall fail to produce the same after the imposition on him of a fine under section one hundred and thirty-seven for thirty days, the Deputy Collector may declare that the proprietor who may have stated the name of such person under section fifty-three shall, for the purposes of the partition, be bound by the rent-roll which the Deputy Collector may adopt for the basis of the partition as hereinafter provided, and after such declaration any officer exercising authority under this Act may refuse to entertain any objection which such proprietor may make to such rent-roll.

Collector may dispense with rent-roll, maps, and other papers.

61. Notwithstanding any thing contained in this Act, if it shall appear to the Deputy Collector that any measurements, maps, rent-rolls, or other papers relating to the estate which have been prepared otherwise than for the purposes of the partition, or otherwise than for the purposes of this Act, afford information sufficiently trustworthy to enable him to effect the partition, the Deputy Collector may adopt such information and such papers either wholly or in part for the purposes of the partition, and may dispense with any rent-rolls, maps, or other papers for which he is authorised to call, or which an applicant is required to produce under this Act.

Proprietor who has failed to attend shall not be entitled to object subsequently.

62. No proprietor or other person, who shall have failed to attend in person or by agent during the measurement as required by the notification published under section fifty-five, shall be entitled at any subsequent time to make any objection to such measurement; but the Collector may admit any objection

made by such proprietor or person if he think fit, provided that any expense entailed by a local enquiry made in consequence of such subsequent objection shall be paid entirely by such proprietor or person.

63. When the Deputy Collector is finally satisfied that the papers before him, whether rent-rolls, measurement papers, maps, or other papers, are sufficient and sufficiently correct to be accepted or adopted for the purposes of the partition, he shall make an order to that effect, and shall fix a day on which to determine the general arrangement of the partition, and shall publish a notification in the manner prescribed by section one hundred and thirty-four, calling on all the proprietors to be present on the day so fixed, such day being not less than thirty or more than sixty days after the publication of the notification in his office, and shall serve a notice to the same effect on each proprietor or his agent.

Notification of date for deciding the mode of partition.

NOTE.—In the case of an estate in which several mouzahs had completely diluviated since the measurement of 16 years before, and valuable large accretions had occurred in other mouzahs, none of which were shown in any of the maps or papers, the Board observed (there being apparently a number of small shareholders) that it would be incumbent on the officers making the partition to exercise considerable caution that the Government revenue does not ultimately suffer by the butwarra, as small shares, consisting of lands in villages subject to active diluvion, may completely disappear in a few years to the serious detriment of the Government revenue. (Board's Proceedings of 18th December 1886, No. 85. Collection 5, File 247).

PART VI.

OF PARTITION BY AMICABLE ARRANGEMENT OR BY ARBITRATION.

64. On the date fixed under the last preceding section, if a petition to that effect signed by all the recorded proprietors shall have been presented, the Deputy Collector may allow such proprietors to make a private partition of the estate amongst themselves on the basis of the papers which have been accepted or adopted for the purposes of the partition by the Deputy Collector, or may refer the partition to be made by an arbitrator or arbitrators on such basis.

Deputy Collector may allow parties to make a private partition.

If the proprietors who have elected to make such private partition shall fail to make the same within such time as may be fixed by the Deputy Collector, the Deputy Collector may refer the partition to be made by an arbitrator or arbitrators, or may make the partition himself.

Procedure on reference to arbitration.

65. Whenever any partition shall have been referred to arbitration, the proceedings shall be conducted in accordance with the provisions of sections 313 to 325 (both inclusive) of Act VIII of 1859 (*an Act for simplifying the procedure of the Court of Civil Judicature not established by Royal Charter*) as far as those provisions are applicable, and except as herein otherwise expressly provided.

NOTE —Act VIII of 1859 has been repealed, and the corresponding sections are 506 to 522 of Act XIV of 1882.

Arbitrators to deliver a partition paper.

66. The arbitrators shall deliver, within a time to be fixed by the Deputy Collector, which time may be further extended by him, a full and complete paper of partition, in such form as may be prescribed by the Board for partitions made by the Collector or Deputy Collector.

Remuneration of arbitrators.

67. The arbitrators, on delivering the paper of partition as aforesaid, shall be entitled to reasonable fees for their services, the amount of which shall be fixed, with the approval of the Commissioner, by the officer making the reference to arbitration, and shall be considered to form part of the cost of making the partition.

Partition made under this Part to be subject to approval of Collector, and superior revenue authorities.

68. Every partition made under the provisions of this Part by the parties, or by arbitrators appointed by them, shall be subject to the approval of the Deputy Collector and to the confirmation of the Collector and the orders of the superior revenue authorities; provided that neither the Deputy Collector nor any other authority shall disallow any partition so made on any other ground than that of fraud, or that, in the opinion of the Deputy Collector or such other authority, the partition cannot be confirmed without endangering the safety of the land revenue.

Land revenue to be assessed by Collector.

69. Whenever a partition has been made under the provisions of this Part, the land revenue shall be assessed by the Collector on each separate estate into which the parent estate is divided by such partition in the manner prescribed by section six.

70. If the paper of partition be not delivered within the time fixed by the Deputy Collector, or within any further period to which the time may have been extended, the Deputy Collector may withdraw the case from arbitration and may make the partition himself.

In default of delivery of partition paper, Collector may withdraw case from arbitration.

PART VII.

OF THE PROCEDURE FROM THE DETERMINATION OF THE GENERAL ARRANGEMENT OF THE PARTITION BY THE DEPUTY COLLECTOR TO THE APPROVAL OF THE PARTITION BY THE COLLECTOR.

71. If no petition shall have been presented under section sixty-four, the Deputy Collector shall, on the date fixed under section sixty-three, or on any other date to which the hearing may have been postponed by a notice posted at the office of the Deputy Collector, consult orally each proprietor present, and endeavour, as far as possible, with the concurrence of the proprietors present, to settle a general arrangement of the partition in accordance with the requirements of this Act.

Procedure when no petition presented under section 64.

For this purpose he shall endeavour to obtain from each proprietor an acknowledgment of his acceptance of the rent-roll, map, and any other papers which have been adopted by the Deputy Collector for the purposes of the partition, and shall briefly record the objections of any proprietor who still objects to accept such rent-roll, map, or other papers.

72. If, in consequence of any objections made before the Deputy Collector has settled the general arrangement of the partition as provided in the last preceding section, the Deputy Collector considers it necessary to make further enquiry, he may, by notice to the recorded proprietors, postpone the settlement of the general arrangement of the partition to a date being not less than fifteen days from the service of the notice on any proprietor.

Deputy Collector may postpone settlement of general arrangement of partition.

Deputy Collector may award compensation for attendance to proprietor.

73. If the objections on account of which the said settlement is postponed are such that the person making the same might have made them on an earlier day, the Deputy Collector may award to each proprietor, who shall have attended in person or by agent in accordance with the notice, such sum, not exceeding sixteen rupees, as he shall think fit by way of compensation for such attendance.

The sum so awarded shall be paid by the person making the objections as aforesaid, and may be recovered from him in the manner provided by section one hundred and thirty-eight.

If no postponement made, Deputy Collector to determine the general arrangement of the partition.

74. If the objections have already been enquired into and disposed of, or are such as not to render necessary any further enquiry and postponement, or when any objections which may require further enquiry have been disposed of, the Deputy Collector shall record an order to that effect, and, after hearing what each proprietor present may urge, shall hold a proceeding determining the general arrangement of the partition and the mode in which the present estate shall be divided, and, in a general way, the position of the lands which shall be assigned to each of the separate estates.

In determining the general arrangement of the partition, the Deputy Collector shall be guided by the rules which are laid down in Part VIII, and shall direct the partition to be made in the manner which, in his opinion, is on the whole most in accordance with such rules, and most equitable and most convenient to all parties concerned.

NOTE:—The general arrangement of the partition must be determined by the Deputy Collector himself. It should never be left to the Amin. (Board's Proceedings of 13th April 1878, No. 60, Collection 7, File 65.)

General arrangement of partition to be submitted for sanction of Collector

75. The general arrangement of the partition, as determined under the last preceding section, shall be submitted for the sanction of the Collector, who shall by notice fix a date for the consideration of the same, not being less than fifteen days after the publication of the said notice in his office, and, after hearing and disposing of any objection which may be preferred, shall pass such orders as he may think proper, setting aside, amending, or approving the general arrangement made by the Deputy Collector.

NOTE.—A Deputy Collector, in the exercise of executive functions, is in the fullest sense the assistant and agent for carrying out the views of the Collector, and over his proceedings the Collector is bound to exercise the closest superintendence, and to interfere whenever he thinks proper to do so. The relative positions of Collector and his Deputy are entirely different from those of a Collector and Commissioner, or those of the Commissioner and the Board. (Board's Proceedings of 14th May 1881, No. 155, Collection 7, File 493.)

76. When the general arrangement has been approved by the Collector, the Deputy Collector shall proceed to fix the exact boundaries of each separate estate, after considering the wishes which the parties may express in respect thereof.

Deputy Collector to fix boundaries.

77. When the Deputy Collector shall have so determined the boundaries, he shall cause to be drawn up a paper of partition specifying in detail the villages and lands which he has included in each of the separate estates, the rental thereof, with any other assets of each separate estate, the name or names of the recorded proprietor or proprietors of each separate estate, any stipulations which may have been made regarding places of worship, tanks, or other matters as mentioned in Part VIII, and the amount of land revenue to be assessed on each separate estate; he shall also prepare a map showing the lands which fall within each separate estate and the boundaries thereof, unless the preparation of such map shall be dispensed with by special permission of the Collector.

Deputy Collector to draw up paper of partition and map.

78. The Deputy Collector shall submit the partition paper and map as aforesaid and all other papers of the partition to the Collector with a full report of the proceedings taken, the reasons which influenced the Deputy Collector in selecting the lands included in each separate estate, the nature of the accounts upon which the apportionment of the land revenue assessed thereon has been based, and all other particulars material to the case.

Deputy Collector to submit papers to Collector.

79. The Deputy Collector shall at the same time cause to be prepared a separate extract of the portion of the partition paper which relates to each separate estate,

and shall cause to be tendered to any recorded proprietor of a separate estate, or any authorized agent of such proprietor, who may be in attendance at the Deputy Collector's office, the extract which relates to such separate estate;

Deputy Collector to prepare extracts of partition papers for each proprietor.

and the Deputy Collector shall publish a notice at his office calling upon every proprietor to whom or to whose agent an extract from the partition paper has not been tendered as above mentioned, to take out of the Deputy Collector's office the extract of the portion of the partition paper relating to his separate estate.

If the circumstances of the partition so require, an extract of the map prepared by the Deputy Collector, or a copy of such map, shall be annexed to every separate extract from the partition paper herein mentioned.

On receipt of papers and report Collector to publish notification.

80. On receipt of the papers and report mentioned in section seventy-eight, the Collector shall cause a notification to be published in the manner prescribed by section one hundred and thirty-four fixing a date, not being less than six weeks from the date of the publication of such notification on the parent estate, on which he will proceed to take up the case, and to consider any representations and objections which may be preferred in respect of the partition made by the Deputy Collector, and calling on all parties concerned who may wish to do so, to inspect the papers at his office before such date, and to take copies of any such papers as they may require.

The Collector shall also cause a notice to the same effect to be served on each of the recorded proprietors.

Procedure of Collector thereupon.

81. On the date so fixed, or on any other date to which the hearing may have been postponed, the Collector shall take into consideration the papers as laid before him, and after calling for any further information which he may deem necessary, and disposing of any objections which shall be made to the proposed partition and allotment of land revenue, may approve the partition as made by the Deputy Collector with such amendments as he may think proper, or return it for amendment to the Deputy Collector who made it, or to another Deputy Collector, or make a fresh partition himself.

The Collector may return the said papers for amendment or enquiry as often as he may think fit.

NOTE.—The modifications which a Collector is entitled under this section to make in a general arrangement of partition finally settled under section 75 are such as are referred to in sections 76 and 77, and relate to the fixing of the exact boundaries of each separate estate, to assessing of the land revenue on each such estate and other matters of

detail. He cannot change the general arrangement approved by him under section 75 and confirmed or amended by the Commissioner on appeal. (Board's Proceedings of 18th December 1886, No. 87, Collection 7, File 249).

82. No proprietor who shall have failed to appear before the Deputy Collector in person or by agent on any date fixed for the arrangement of the partition under section sixty-three or section seventy-two, and no proprietor who shall have failed so to appear before the Collector on any date fixed under either of the two last preceding sections, shall be entitled, at any subsequent time, to make any objection to the orders which may be passed on such dates respectively.

Proprietor when not entitled to make subsequent objection.

83. When the Collector approves the partition made by the Deputy Collector with amendments, he may cause a fresh partition paper and map to be prepared, or may cause the amendments made by him to be noted on the paper and map submitted by the Deputy Collector.

Collector may cause a fresh partition paper and map to be prepared.

When the Collector makes a fresh partition himself, he shall cause a fresh partition paper and map to be prepared.

84. Whenever the Collector shall have approved a partition (whether with or without amendment), he shall cause a notice to be served on each of the recorded proprietors that the papers will be submitted at once for confirmation of the partition by the Commissioner, and that any appeals or objections must be presented to the Commissioner, or to the Collector for transmission to the Commissioner, within thirty days of the date of the service of the said notice, or, if the Collector has approved the partition with amendments, and the notice requires the proprietor to produce the extract of any partition in order that amendments may be noted thereon, or to take out a fresh extract from the partition paper, as provided in the next succeeding section, then within six weeks of such date.

Procedure when Collector approves of a partition without amendment.

85. Whenever the Collector shall have approved a partition with amendments, and shall, under section eighty-three, have caused such amendments to be noted on the partition paper and map submitted by the Deputy Collector, the notice to be served on each of the recorded proprietors under the last preceding section shall, in the case of every such proprietor whose separate estate is affected by such amendment, in addi-

Procedure when Collector approves partition paper with amendments.

tion to the particulars mentioned in the said section, require such proprietor to produce before the Collector, within fifteen days of the service of such notice, the extract from the paper of partition which has been prepared, and any map relating to his separate estate which may have been prepared under section seventy-nine, in order that the amendments made by the Collector in the partition may be noted thereon; and such amendments shall be noted thereon by the Collector accordingly, and such extract and map shall be returned to the proprietor who produced them.

Whenever the Collector shall have caused, under section eighty-three, a new partition paper and map to be prepared, he shall order separate extracts from the portions of the partition paper which relate to each separate estate, and maps, if necessary, to be prepared as required by section seventy-nine, and in such case the notice served under the last preceding section shall, in addition to the particulars mentioned in that section, declare the extracts and maps which were furnished or offered to proprietors under section seventy-nine to be cancelled, and shall require the recorded proprietors to take out of the Collector's office such extracts and maps relating to their respective separate estates.

Papers to be forwarded to Commissioner.

86. As soon as practicable after the issue of the notice under section eighty-four, the Collector shall forward to the Commissioner all papers relating to the partition as approved of as made by the Collector.

PART VIII.

OF THE GENERAL PRINCIPLES ON WHICH PARTITIONS SHALL BE MADE.

Rules applicable to the partition of lands which are held by the proprietors in common tenancy.

Estates formed in course of partition to be as compact as possible.

87. Each separate estate shall be made as compact as is compatible with the primary object of making an equitable partition among the proprietors, and with the other provisions of this Part, but no partition made or approved by a Collector shall be set aside on the ground only that the separate estates are not compact.

88. In selecting the villages or lands to be assigned to each separate estate formed out of a parent estate which has been held in common tenancy, the Collector shall take into consideration the advantages or disadvantages arising from situation ;

Circumstances to be considered in making partitions.

the vicinity of roads, railways, navigable rivers, or canals ;
 the nature and quality of the soil and produce ;
 the quantity of cultivable and uncultivable waste land ;
 the facilities for irrigation ;
 the state of the embankments and water-courses ;
 liability to accretion and diluvion.

and any other circumstances, affecting the value of the lands.

89. If a dwelling-house belonging to one proprietor is situated on any land which it may be necessary to include in the separate estate of another proprietor, the owner of such house may retain occupation thereof with the offices, buildings and grounds immediately attached thereto, upon agreeing to pay rent for the land occupied by such dwelling-house, offices, buildings, and grounds to the proprietor of the separate estate in which such land is included.

Rule when dwelling-house belonging to one proprietor is situated on ground to be allotted to another proprietor.

The limits of the land so occupied and the rent to be paid for it in perpetuity shall be fixed by the Deputy Collector, and shall be stated in the paper of partition.

In every such case a defined pathway shall, as far as possible, be secured to the owner of the house, leading from his house to some portion of the separate estate allotted to him.

90. Whenever the Deputy Collector shall think fit, he may apply the rule contained in the last preceding section to gardens, to orchards of trees, to land planted with bamboos, and to any other lands which in his opinion are of special value to the proprietor in whose occupation they are found to be, in consequence of improvements made by such proprietor or of the particular use to which such lands are put.

Rule contained in last preceding section may be applied to gardens, orchards, &c.

91. The rent fixed in perpetuity on any land by the Deputy Collector under either of the two last preceding sections shall be considered to be the rental of such land for the purposes of the partition.

Calculation of rental.

92. Whenever the dwelling-house of one proprietor, with the offices, buildings, and grounds immediately attached thereto,

Rent may be redeemed.

shall have been included in the separate estate of another proprietor, and the annual rent to be paid in perpetuity in respect of the land occupied thereby shall have been fixed by the Deputy Collector and stated in the paper of partition, the proprietor whose dwelling-house, offices, buildings, and grounds have been included as aforesaid may apply to the Deputy Collector for permission to redeem the annual rent so fixed, and the Deputy Collector shall give such permission, unless he shall be of opinion that such redemption would endanger the safety of the land revenue for the payment of which the separate estate in which such dwelling-house, offices, buildings, and grounds have been included will be liable.

Deputy Col-
lector to
certify
amount pay-
able in re-
demption of
rent.

93. If the Deputy Collector shall see no such reason to refuse his permission to the redemption being made, he shall certify the amount payable by such proprietor in redemption of such annual rent; and such amount shall be calculated and fixed by the Deputy Collector at ten per centum above the sum which would be required to purchase, at the market prices then prevailing, so much stock of the Government loan which was last issued as would yield an annual amount of interest equal to the annual land rent fixed by the Deputy Collector under section eighty-nine.

But not after
possession of
separate
estates has
been given.

94. The proprietor, desiring to redeem the rent as aforesaid, may pay to the Deputy Collector the amount so certified at any time before possession is given to the several proprietors of the separate estates allotted to each, as provided in section one hundred and twenty-three, but not after such possession has been given.

Notice of
payment to
be given, and
land to be
held rent-free.

95. On receipt of such payment, the Deputy Collector shall give notice to the proprietor in whose separate estate such land is situated that such payment has been made, and that the sum will be paid to him or to his authorised agent on application; and that, from the date on which possession as aforesaid may be given, the proprietor who has redeemed the rent of such land will be entitled to hold such land as a rent-free tenure secured against the proprietor of the estate and against any auction purchaser at a sale for arrears of revenue, including the Government; and from such date the lands shall be so held as a rent-free tenure.

96. The Deputy Collector shall at the same time also give notice to the Collector of the district of the creation of such tenure; and the Collector of the district shall thereupon cause such tenure to be specially registered in the manner provided by section 42 of Act XI of 1859, or by any similar law for the time being in force.

Collector to register rent-free tenure.

97. When two or more of the separate estates shall consist of the same proportions of the parent estate, the Deputy Collector may, if he thinks proper, direct the parties entitled thereto respectively to draw lots in his presence for the equal separate estates which have been formed by assignment of lands, unless the recorded proprietors of the equal shares shall agree among themselves as to the allotment of the equal separate estates and shall present a petition to that effect; or unless for any other reason the Deputy Collector shall, with the sanction of the Collector, think proper to assign the equal separate estates to the proprietors of the equal shares without causing lots to be drawn.

Lots may be drawn for equal shares.

98. When the aggregate of two or more shares equals one other share, or equals the aggregate of two or more other shares, the Deputy Collector, with the sanction of the Collector, may cause such aggregate shares to be treated as one share for the purpose of determining by lots as aforesaid which portion of the parent estate shall be assigned to each proprietor as his separate estate:

Order and method of drawing lots when aggregate of two or more shares equals one other share.

and may decide which shares shall be formed into one aggregate share for the purpose of causing such lots to be drawn;

and may cause lots to be drawn in like manner as often as he shall think proper for such purpose.

And after lots shall have been drawn once (or more than once if necessary) as aforesaid, the Deputy Collector shall proceed to divide the portion of the parent estate which has fallen by lot to each aggregate share, among the proprietors of the different shares which were formed into such aggregate share for the purpose of drawing lots, and shall assign to every such proprietor his separate estate within such portion in such position as the Deputy Collector may think proper.

Provided that lots shall in no case be drawn until after full opportunity shall have been given to the proprietors to advance

their objections in respect of the papers accepted as the basis of the partition and in respect of the assets of the different lands as stated in such papers, and until any such objections which may have been made shall have been disposed of.

Illustrations.

I.—The partition of a parent estate is being made into the following shares:—

8 annas.
4 annas.
3 annas.
1 anna.

For the purposes of drawing lots, the 4 annas, 3 annas, and 1 anna share may be taken together, and considered to be an aggregate 8 annas share.

The Deputy Collector will divide the parent estate into two halves of equal value, and will then cause lots to be drawn, in order to determine which of the two halves shall be assigned to the proprietor of the integral 8 annas share, and which shall be divided among the proprietors of the 4 annas, 3 annas, and 1 anna shares.

Subsequently, if necessary, the Deputy Collector may again cause lots to be drawn by the proprietor of the 4 annas share on the one hand, and the proprietors of the aggregate share made up by taking together the 3 annas share and the 1 anna share.

II.—The partition is being made of a parent estate into the following shares:—

6 annas.
4 annas.
3 annas.
2 annas.
1 anna.

Two tracts in the estate may first be marked off, the value of each being equivalent to a 6 annas share; and then, for the purpose of drawing lots in respect of the assignment of these two tracts, the 4 annas share and the 2 annas share may be taken together as an aggregate 6 annas share, and lots may be drawn between the proprietor of the aggregate 6 annas share so formed on the one hand, and the proprietor of the integral 6 annas share on the other.

One of the two 6 annas tracts having thus been finally assigned to the proprietor of the integral 6 annas share, the Deputy Collector will proceed to assign the rest of the estate among the remaining sharers; and he may again, for the purpose of causing lots to be drawn, mark off two tracts, the value of each of which shall be equivalent to 5 annas of the parent estate, and may cause lots to be drawn for these two tracts between the proprietors of the 4 annas share and the 1 anna share taken together as an aggregate 5 annas share on the one hand, and the pro-

prietors of the 3 annas share and the 2 annas share taken together as another 5 annas share on the other.

Finally, their separate estates will be assigned to the proprietor of the 4 annas share and, of the 1 anna share respectively, within the tract which fell to them jointly by lot; and their separate estates will be assigned to the proprietors of the 3 annas share and of the 2 annas shares respectively within the tract which fell to them jointly by lot.

99. The Deputy Collector may, by a notice served as provided in section one hundred and thirty-five, require any proprietor in respect of whose share lots are to be drawn as provided in either of the two last preceding section, to attend at the office of the Deputy Collector in person or by authorized agent at a time to be fixed by the Deputy Collector for the purpose of drawing lots;

Deputy Collector may require proprietors to attend or appoint agent for the purpose of drawing lots.

and may similarly require the proprietors of any shares which he may have ordered to be formed into an aggregate share for the purpose of drawing lots, jointly to appoint an agent to draw lots, on their joint behalf; and if at the time fixed for drawing such lots such proprietors have failed to agree to any such joint appointment, or shall fail to cause the attendance of an agent authorized to act jointly for all such proprietors, all such proprietors shall be deemed to have failed to comply with the Deputy Collector's requisition.

100. Whenever any proprietor or proprietors shall have failed to comply with a requisition of the Deputy Collector under the last preceding section, the Deputy Collector may appoint a person to draw lots on behalf of such proprietor or proprietors.

In default Deputy Collector may appoint a person to draw lots.

Rules applicable to the formation into separate estates of lands which are held by proprietors in severalty.

101. Whenever in any parent estate a division of the lands thereof has been made by private arrangement of the proprietors of such estate, and in accordance with such arrangement each proprietor is in possession of separate lands held in severalty as representing his interest in such parent estate, the joint application presented to the Collector by all the recorded proprietors of such estate as required by section twelve may be to the effect that a partition of such estate be made by assigning to each proprietor or to two or more proprietors jointly as his or their separate estate, the lands of which they are in separate possession in accordance with

Joint petition may be presented for partition according to private division.

such arrangement, and also that each separate estate so formed be made liable for such portion of the entire land revenue of the parent estate as was paid by the proprietor or proprietors thereof under the private arrangement aforesaid.

Partition according to private division to be referred to Collector.

102. The Deputy Collector who is appointed to carry out the partition in accordance with such application shall satisfy himself that the assets of each separate estate which it is proposed to form are sufficient to secure the payment of the annual amount of land revenue for which it is proposed to make such separate estate liable; and if the Deputy Collector be satisfied that in this respect, and with reference to all the circumstances of the case, the partition of the lands and the assessment of the revenue thereon may be made in the manner proposed without endangering the safety of the revenue, the Deputy Collector shall submit the case with his opinion thereon, and the reasons on which such opinion is founded, to the Collector, who may admit or reject the said application.

Effect of Collector's approval.

103. If the Collector admits the said application, such admission shall be deemed to be the Collector's approval of the general arrangement of the partition as provided in section seventy-five, and the Deputy Collector shall proceed to complete the partition accordingly.

Such partition may be refused.

104. If the Deputy Collector, who is appointed to carry out the partition in accordance with a joint application under section one hundred and one, is not satisfied that the partition of the lands and the assessment of the revenue payable thereon can be made in the manner proposed without endangering the safety of the public revenue, or if the Collector rejects the application for such partition, the Deputy Collector shall refuse to make the same.

Joint petition may be presented for partition of land in accordance with private division with proportional redistribution of public revenue.

105. Whenever the proprietors of an estate are, in accordance with a private arrangement as aforesaid, respectively in possession of separate lands held in severalty as representing their respective interests in the estate, the joint application presented to the Collector by all the recorded proprietors of the estate, as required by section twelve, may be to the effect that a partition of such estate be made by assigning to each proprietor, or to two or more proprietors jointly, as his or their separate estate, the lands of which they are in possession in

accordance with such arrangement, and that the land revenue for which the parent estate is liable may be apportioned among the separate estates so formed in accordance with the provisions of section six.

A joint application under this section may be made notwithstanding that a joint application under section one hundred and one has been refused in respect of the same estate.

106. Whenever the Deputy Collector who is appointed to carry out a partition shall find that, in accordance with a private arrangement made by the proprietors of an estate, the proprietors respectively, or any of the proprietors, are in possession of separate lands held in severalty as representing portions only of their respective interests in the parent estate, while other lands of the parent estate are held in common tenancy between such proprietors, a joint application as mentioned in section twelve shall not be necessary to authorise the Collector to make a partition of the estate, but the Deputy Collector shall allot to the separate estate of each proprietor the lands of which such proprietor is found to be in possession in severalty in accordance with such private arrangement.

Lands of which each proprietor is in possession to be allotted to him.

Lands held in the occupation of the several proprietors of an estate as sir, khāmar, or nij-jote, or under any other similar denomination, shall not be deemed to be lands held in severalty as representing portions of their respective interests in the parent estate within the meaning of this section, which applies only to cases in which there has been a *bona fide* division, by private arrangement among the proprietors, of land held by tenants.

107. Notwithstanding anything contained in the last preceding section, the Collector may cause any transfer of lands agreed to by the parties to be made from the possession of one proprietor to that of another.

Collector may cause transfer of lands agreed to by parties.

Rules applicable both to lands held in common tenancy and to lands held in severalty.

108. Places of worship, burning grounds, and burial grounds which have been held in common previous to the partition of an estate, and lands of which the proceeds have been assigned by the proprietors jointly for religious, charitable,

Rules as to places of worship.

or public purposes, shall continue to be held in common unless the proprietors shall otherwise agree amongst themselves, in which case they shall state in writing the agreement into which they have entered, and the Deputy Collector shall enter a note of the agreement in the paper of partition.

Rule as to
tanks, wells,
water-courses
and embank-
ments.

109. Tanks, wells, water-courses and embankments shall be considered as attached to the land for the benefit of which they were originally made.

In cases in which, from the extent, situation, or construction of such works it shall be found necessary that they should remain the joint property of the proprietors of two or more of the separate estates, the paper of partition shall specify, as far as the circumstances may admit, the extent to which the proprietors of each of such estates may make use of the same, and the proportion of the charges for repairs to be borne by them respectively.

Lands held
rent-free not
to be divided.

110. Whenever the Deputy Collector shall find in the parent estate lands which are actually held rent-free (whether the proprietors of the estate do or do not claim a right to receive rent from such lands), the Deputy Collector shall make no division or assignment of such lands among the separate estates, but shall specify in the partition papers and proceedings that such lands are left appertaining jointly to all the separate estates which are formed out of the parent estate, in the proportion which each separate estate bears to the parent estate.

Provided that such lands or any of them may be allotted among the different separate estates with the consent of all the recorded proprietors of the parent estate, but not otherwise.

Rule as to
- permanent
intermediate
tenures.

111. Whenever the Deputy Collector shall find in the parent estate any lands which are held at a fixed rent on a patni or other permanent intermediate tenure falling within Exception 2 or Exception 3 of section seven, the Deputy Collector may either

(1) assign the lands which are held on such tenure and the assets thereof entirely to one or more of the separate estates, the rental being calculated as provided in Exception 2 or in Exception 3 (as the case may be) of section seven; or

(2) leave such lands unassigned to any separate estate, and specify in the partition paper and proceedings that the lands are

left appertaining jointly to all the separate estates which are formed out of the parent estate in the proportion which each separate estate bears to the parent estate. In the event of such lands being so left undivided, the Deputy Collector shall assign to each separate estate such share of the rental of the tenure as shall bear the same proportion to the entire rental of tenure, as the separate estate bears to the parent estate.

In dealing with a tenure under this section, the Deputy-Collector shall take into consideration the extent of the lands comprised in the tenure, and all other circumstances of the case.

112. Whenever any lands are held in common between the proprietors of two or more estates, one of which is under partition in accordance with the provisions of this Act, the Deputy Collector shall first allot to the estate under partition a portion of such common lands of which the assets are in proportion to the interest which the proprietors of such estate hold in the said common lands; and all the provisions of this Act in respect of the allotment between the shareholder in one estate, of lands which are held jointly by such shareholders, shall, as far as possible, apply to the allotment of the proportionate share of such common lands to the estate under partition;

Lands held in common between the proprietors of two or more estates how to be dealt with.

and, in respect of the service of notices, hearing of objections, and all other procedure in view to such allotment, the proprietors of the estate under partition, and the proprietors of all other estates who have an interest in the said common lands, shall be deemed to be joint proprietors of a parent estate consisting only of the lands so held in common.

Provided that all expenses of any division of lands so held in common between the proprietors of two or more estates shall be deemed to be expenses of making the partition of the estate which is under partition and shall be leviable as provided by this Act from the proprietors of such estate, and the proprietors of any other estate having an interest in such lands shall not be required to bear any portion of such expenses.

NOTE 1.—The words “any lands” in the first clause of the section may be held to mean “all the lands” of two or more estates held in common by several proprietors. (Board's Proceedings of 2nd September 1882, No. 210, Collection 7, File 2209, and of 18th July 1885, No. 264, Collection 5, File 3857.)

NOTE 2.—An application having been made for the partition of an estate, a portion of the assets of which consisted of a fractional interest in the rents of a mouzah which was held in common with four other estates in the Collector's register, it was considered, by the Board that this section did not cover the case. (Board's Proceedings of 20th February 1886, No. 97, Collection 2, File 630).

NOTE 3.—Until the Collector has declared the extent of interest which the proprietors of the parent-estate are supposed to have in all the common lands of the several estates, no proceedings can be carried out under this section. (Board's Proceedings of 8th January 1887, No. 228, Collection 7, File 228).

NOTE 4.—The lands of an estate were mixed up with the lands of a rent-free holding. The estate having come under partition, a question arose how the Collector should carry on the partition. The matter having been referred to the Legal Remembrancer, that officer gave as his opinion the following :—“ The word ‘ estate ’ is distinctly defined in the Partition Act, and that definition must prevail wherever the word occurs throughout the Act. The Collector has no jurisdiction to partition *lakhiraj* lands—that is work for the Civil Court. He cannot therefore in any way bind the *lakhirajdars* to perform the first duty imposed by section 112, namely, to portion off the proportion of the joint lands which would be properly coming within the estate he is partitioning. If the *lakhirajdar* himself in an effectual manner broke up the joint holding and abandoned to the estate the exclusive possession of a definite area which the estate accepted, then the portion so falling exclusively within the estate might be partitioned by the Collector among the owners of the estate. But otherwise the Collector cannot interfere with the joint lands.” (Board's Proceedings of 19th April 1890, No. 71, Collection 7, File 10 of 1890). 2-4-90.

NOTE 5.—Certain lands were held in common by the proprietors of estates Nos. — of the — towjih. The proprietors of each of these estates filed a separate application, not for partition of their several estates *inter se*, but for separation of the lands held in common and assignment of its proper share thereof to each of the above estates, the Government revenue of each remaining unaffected. The question whether the applications should be admitted and the estates declared to be under partition was referred by the Commissioner to the Board, who ruled as follows :—“ The question for consideration is—can two or more entire estates not desiring partition as such, but having lands in common, get their common lands divided between them under section 112? The Board as at present constituted think that it would be conducive to the public convenience if they could, but they fear that the wording of the section is quite conclusive the other way. Section 112 can only come into operation when one of the estates is under partition as between its several proprietors. This is an indispensable condition.

"In this case there is no partition proposed of any estate as such, but only a separation of interests between 5 separate estates, and the law (section 112) cannot be applied."—(Board's Proceedings of 28th June 1890, No. 209, Collection 5, File 32 of 1890). 1-7-90.

113. Notwithstanding anything contained in the last preceding section, if it shall appear to the Commissioner, on the report of the Collector or otherwise, that the proceedings for such division have been unnecessarily delayed, and the cost of such division enhanced by obstacles vexatiously put in the way of the completion of such division by any proprietor of any estate other than that under partition, or by want of due diligence on the part of any such proprietor in carrying out any requisitions made upon him, the Commissioner may direct that such sum as he shall think fit shall be levied from every such proprietor who is responsible for such delay or additional cost, and every sum so levied shall be taken in diminution of the amount payable by the proprietors of the estate under partition as costs of such partition.

Proprietors of other estates may be required to pay a portion of expenses of partition.

114. The allotment to the estate under partition of the proportionate share of the lands so held in common shall be submitted for the approval of the Collector, who may confirm, amend or reject the same, and in the case of rejection, may make or direct to be made another allotment.

Allotment of lands held in common to be sanctioned by Collector.

115. As soon as the allotment to the estate under partition of a proportionate share of the said lands shall have been approved by the Collector, the lands so allotted shall be dealt with in every respect as if they were held in common tenancy by such of the proprietors of the estate under partition as were found to hold interests in the common lands. . . .

The portion of such common lands assigned to estate under partition how to be dealt with.

116. If a dispute or doubt shall be found to exist as to whether any lands form part of the parent estate, the Deputy Collector shall enquire into the fact of possession, and shall report his conclusions, with the reasons thereof, to the Collector; whereupon

Procedure when dispute exists as to whether any lands form part of the parent estate.

the Collector may (whether the possession of disputed lands is with the proprietors of the parent estate or otherwise) order that the partition be struck off the file, and in that case no application for a partition of the said estate shall be admitted until the applicant can show that the dispute or doubt has been

decided by a court of competent jurisdiction, or has been amicably settled ;

Procedure
when Collec-
tor thinks
that lands
belong to
parent
estate

or if the Collector shall find that possession of the disputed lands is with the proprietors of the parent estate, and if it shall appear to him that the claim of the other parties to the right in such lands is untenable, he may order that the partition shall proceed, and that the disputed lands be treated as part of the estate under partition.

Provided that no partition shall be made under this section, if such partition would involve the assignment to any separate estate of such a quantity of the disputed land that the removal of such land from such estate would, in the opinion of the Collector, endanger the safety of the land revenue for which such estate would be liable after the partition.

NOTE.—While the partition proceedings of an estate were in progress, an objection was raised by the owner of another estate that his lands were included in the measurement of the estate under partition. Thereupon the Deputy Collector held a local enquiry, and it was found that the proprietors were in possession of a portion only of the lands claimed by the objector, and that the objectors were in possession of the rest of the land under objection. The Commissioner in appeal considered that the claims of the objectors could therefore not be said to have been wholly untenable, and held that the Collector had no option but to strike the case off the file. The construction which the Commissioner had put on this section was one in which the Board found themselves unable to concur. They observed that the object of this section was to provide a procedure in cases where there was a dispute as to whether any lands formed part of the parent estate. " Clause 1 provides for local enquiry by a Deputy Collector as to possession ; clause 2 empowers the Collector in cases where he thought fit to do so to order the partition to be struck off the file, quite irrespective of the question whether possession be with the proprietor of the parent estate or not ; clause 3 gives the Collector the alternative power in cases where he shall find that possession of the disputed land is with the proprietor, and that the claim of other parties to the right is untenable, to order the partition to proceed. The Board held that the fact that possession of only some of the lands claimed might be given to the proprietors did not affect the question in any way. The Board therefore held that the construction put by the Commissioner on clause 3 of this section was an erroneous one. They, however, in consideration of the numerous disputes existing as to the lands which formed part of the estate, ordered under the second clause of this section that the partition should be

struck off the file. (Board's Proceedings of 14th March 1885, No. 399, Collection 5, File 1672).

117. If after a partition has been completed in accordance with an order passed by the Collector under clause three of the last preceding section, the proprietor of any separate estate shall be dispossessed by a decree of a court of competent jurisdiction of any lands which may have been assigned to his estate by the partition, such proprietor shall not be entitled to claim any modification of the partition (which shall hold good), but shall be entitled to recover from the proprietors of the other separate estates formed by the partition such compensation as may be fair and equitable, having regard to the reduction in the proportionate value of his separate estate which is caused by such dispossession ;

and such compensation may be recovered in a court of competent jurisdiction from the proprietors of those separate estates on which a proportionate share of the total loss caused by the order of dispossession does not fall.

Procedure when partition completed and proprietor of an estate dispossessed by order of a competent court.

PART IX.

OF THE PROCEDURE BEFORE THE COMMISSIONER UP TO THE COMPLETION OF THE PARTITION. "

118. If no appeal or objection shall be presented within the time allowed by section eighty-four, the Commissioner may proceed to consider the case without issue of any notice, and may confirm the partition made by the Collector.

If no appeal presented, Commissioner may consider the case without issue of notice.

119. If it shall appear to the Commissioner that the proceedings of the Collector should be amended, or if a petition of appeal or an objection shall have been presented within the time allowed by section eighty-four, the Commissioner shall fix a day for hearing and disposing of the case, and shall

Commissioner to fix a day for hearing case.

cause a notification of the same to be published and a notice of the same to be posted up in his own office.

Commissioner to confirm, amend, or return petition.

120. On the day so fixed, which shall not be less than thirty days after the publication of the said notification at the office of the Collector, or on any subsequent day to which the hearing of the case may extend, or on any subsequent day to which the hearing may have been postponed by a notice published in his own office, the Commissioner shall, after hearing and disposing of all objections, and calling for any further information which may be necessary, either confirm the partition as made by the Collector or amend the same, or return the papers of the partition to the Collector for any changes the Commissioner may think proper to be made.

If the partition is returned to the Collector for amendment, the Collector shall proceed to make the said amendments or to cause them to be made in the same manner as if he had himself passed such orders on a partition submitted to him for approval by a Deputy Collector.

Commissioner may return papers for amendment or enquiry.

121. The Commissioner may, before confirming a partition, return the papers for amendment or enquiry as often as he shall think fit, and as often as he shall so return them the procedure prescribed in the three last preceding sections shall be followed.

Procedure by Collector on receipt of order of Commissioner or of Board of Revenue on appeal.

122. After the expiration of not less than sixty days from the date of the order of the Commissioner confirming a partition, or, if an appeal has been preferred to the Board, or if any proceedings in respect of the partition be pending before the Board, then on receipt of the final order of the Board determining that the partition as sanctioned by the Commissioner shall not be disturbed, the Collector shall cause to be published in his office, and in some conspicuous place in each of the estates separately constituted by such order, a notice that the partition has been finally confirmed as it was sanctioned by the Commissioner, or with any amendments or alterations, as the case may be.

If the partition as finally sanctioned involves any amendments which may conveniently be made on the extracts of the partition paper and on any maps which have been prepared

and delivered or offered by notice to the recorded proprietors as required by section seventy-nine or section eighty-five, the Collector shall cause a notice to be served on every recorded proprietor whose estate is affected by such amendments requiring him to produce such extracts and maps in order that such amendments may be noted on them ;

and if the alterations made in the partition as finally sanctioned be such as to make it desirable to prepare fresh extracts and maps as aforesaid, the Collector shall cause such fresh extracts and maps to be prepared ; and shall cause a notice to be served on each proprietor declaring the extract and map which was furnished or offered to him under section seventy-nine or section eighty-five, as the case may be, to be cancelled and requiring him to take out of the Collector's office the fresh extract and map which have been prepared.

123. The Collector shall then proceed to give the several proprietors possession of the separate estates allotted to each, and, if necessary, may require the assistance of the Magistrate in giving such possession ;

Procedure as to giving possession of separate estates.

and shall cause to be served on every recorded proprietor of a separate estate a notice informing him that from the date specified in such notice the separate estate assigned to him (as described in the extract from the partition paper prepared and delivered or offered to him under section seventy-nine, section eighty-five, or the last preceding section, as the case may be) will be deemed to be separated from the parent estate, and, to be separately liable for the amount of land revenue specified in such notice, and calling upon him to enter into a separate engagement for the payment of such revenue. • •

NOTE.—A sharer of an estate, the partition of which has been confirmed, is entitled to be placed in possession of the lands included in the partition, as demarcated and shown in the map and measurements and assigned to his share, but they will not be demarcated by the Collector. The proprietor of the newly-formed separate estate may himself demarcate his lands, and if any party feels himself aggrieved by the proceedings of the proprietor, his remedy lies in the Civil Court. (Board's Proceedings of 3rd August 1878, No. 268, Collection 7, File 143).

124. The date specified in such notice shall not be more than three months after the proprietors have been put in possession of their respective separate estates as herein provided.

Date specified in notice under preceding section.

Each separate estate to be borne on the revenue roll as separately liable for revenue assessed upon it.

125. From the date specified in such notice, each separate estate shall be borne on the revenue roll and General Register of the Collector as a distinct estate separately liable for the amount of land revenue assessed upon it under this Act; and shall be so liable, whether the proprietor have executed an agreement for the payment of the amount of land revenue so assessed upon the said estate, or whether he shall have failed to execute such agreement.

Collector may direct the construction of boundary marks.

126. The Collector may direct the construction of such boundary marks as he may think proper to distinguish the lands of each separate estate, and the cost of such boundary marks shall be deemed to be expenses of the partition.

Boundary marks erected under this Act shall be assigned to zemindars, or to zemindars jointly with tenure-holders, for preservation, as provided in the second clause of section 29 of "The Bengal Survey Act, 1875," and after they have been so assigned, the provisions of sections 19, 20, and 52 to 57 (both inclusive) of the said Act shall apply to such boundary marks.

PART X.

MISCELLANEOUS.

Any point may be referred to arbitration.

127. The Deputy Collector, with the consent of all the parties concerned, may refer to arbitration; any point arising in the course of a partition; and the provisions of sections sixty-five and sixty-seven shall, as far as possible, be applicable to such references.

Case of proprietor who has created a tenure.

128. If any proprietor of an estate held in common tenancy and brought under partition in accordance with the provisions of this Act shall have given his share or a portion of it in patni or other tenure or lease, such tenure or lease shall hold good, as regards the lands finally allotted to the share of the lessor, and only as to such lands.

Illustrations.

I.—A, the proprietor of a quarter share in a joint undivided estate held in common tenancy, gives to B a patni tenure of the whole of his interest in the estate, entitling B, as long as such estate is held in common tenancy, to collect one-fourth of the rent payable by every ryot on the estate;

Partition of the said estate is made under this Act, and certain specific lands are assigned to A as his separate estate;

B will become patnidar of the entire separate estate which has been assigned to A, and will be entitled to collect the whole of the rents from the ryots on that estate.

II.—A, the proprietor of a quarter share in a joint undivided estate held in common tenancy, gives to B a patni tenure of one-half of his share in the estate, entitling B, as long as such estate is held in common tenancy, to collect one-eighth of the rent payable by every ryot on the estate;

Partition of the estate is made under the Act, and certain specific lands are assigned to A as his separate estate;

B will become patnidar of one-half of A's separate estate, and will hold his patni in common tenancy with the half of A's interest which A has not given in patni, so that B will be entitled to collect one-half of the rent payable by every ryot on A's estate, and A will be entitled to collect the other half.

129. If two or more estates shall come into the possession of one proprietor or of the same body of proprietors, such proprietor or body of proprietors after being recorded as proprietors, may apply to have such estates united, and to hold them as a single estate.

Two estates may be united.

130. Such application shall be made in writing to the Collector, and the Collector shall, not less than thirty days after the issue of a notification of such application (provided he see no objection), comply with the same, and cause the necessary entries to be made in the records of his office, and shall report the case to the Commissioner.

Application for such union how to be made, and how to be dealt with.

131. Whenever any separate estate created under this Act shall fall in arrear so as to require a sale of the land for the discharge of the arrear at any period within twelve years of the date of the confirmation of the partition, the Collector shall, if possible, ascertain the cause of the estate having fallen into arrear, and shall enquire whether such arrear has been caused

Cause of sale of a separate estate for arrears to be ascertained.

by any fraudulent or erroneous allotment of the assessment or assignment of lands at the time of the partition, and shall make a report upon the case to the Commissioner for such action as the Commissioner may think proper.

In certain cases Lieutenant-Governor may order a new allotment of the land revenue.

132. If it shall be proved to the satisfaction of the Lieutenant-Governor at any time within twelve years from the date of the final confirmation of a partition by the Commissioner or by the Board, as the case may be, that through any fraud or error at the time of making the partition the assets of the lands assigned to any separate estate were not in proportion to the amount of land revenue for which such estate was made liable, or that the amount of land revenue assessed on any separate estate was not in proportion to the assets of the lands assigned to such estate, the Lieutenant-Governor may order a new allotment of the land revenue upon the separate estates in accordance with the principles prescribed in this Act, on an estimate of the assets of each such estate as they stood at the time of the partition, such estimate being made on such evidence and information as may be procurable respecting the same.

Under-assessed estates to make refund to over-assessed estates.

133. Whenever the Lieutenant-Governor shall pass an order for the re-allotment of the land revenue on any separate estate under the last preceding section, the Lieutenant-Governor may direct that the proprietors whose estates are found to have been under-assessed shall, for each year during which they have held possession of the separate estates, be required to pay to the recorded proprietors of the estates which have been over-assessed, a sum equal to the annual amount in which the latter shall be found to have been over-assessed, and in default of payment the amount shall be leviable as provided in section one hundred and thirty-eight.

No order passed by the Lieutenant-Governor under this section shall be liable to be contested in any Court.

Publication of notifications under this Act.

134. Every notification required to be published in and by this Act shall, unless it is otherwise especially directed, be published by posting up copies of the same at the office of the Collector, and of the Deputy Collector who is making or has made the partition, at the māl cutcherry or māl cutcherries (if any) of the proprietors of the parent estate, and at one or more of the principal viKages on the said estate.

135. Every notice in and by this Act required to be served on any person may be served— Service of notice.

- (1) by delivering the same to the person to whom it is directed, or, on failure of such service, by posting the same on some conspicuous part of the house in which the said person usually resides, or by delivering the said notice to a general agent of the person to whom such notice is directed, or to any person who has been appointed in that behalf, or who has been appointed an agent of the person to whom the notice is directed for the general purposes of any partition under this Act; or
- (2) by sending a registered letter containing such notice directed to the said person at his usual place of abode or to the place where he may be known to be residing; or
- (3) by posting a copy of the notice at any māl cutcherry of the person to whom the notice is directed; or, if no such māl cutcherry be found, and if the notice cannot be served in any of the other modes mentioned in this section, on some conspicuous place on the estate to which such notice relates.

In all cases where two or more persons are joint applicants for the separation of an estate to be held by them jointly as a separate estate, service of notice under this section on any one such joint applicant shall be deemed to be good and sufficient service on each and all of such joint applicants.

136. Provided the directions of this Act be in substance and effect complied with, no proceedings under this Act shall be affected by reason of any mistake or by reason of any other informality, unless any person has suffered, or is in danger of suffering, material injury in consequence of such mistake or informality; No proceedings under this Act to be affected by any mistake or misdescription.

and no proceedings under this Act shall be affected by reason of the omission to issue any notification required by this Act, or to serve any notice on any person whose name is not recorded on the Collector's registers as proprietor of the estate in respect of which the notice is, required to be served.

Fine in case of non-compliance with notice or requisition.

137. If any proprietor or other person shall fail to comply within the time fixed by a notice served on him as by this Act provided, with any requisition made upon him under this Act by the Collector or Deputy Collector, the Collector or Deputy Collector may impose upon him such daily fine as he may think fit, not exceeding fifty rupees ;

and such fine shall be payable daily until the requisition is complied with,

and the Collector or Deputy Collector may proceed from time to time to levy the amount which has become due in respect of any such fine, notwithstanding that an appeal against the order imposing such fine may be pending ;

Provided that, whenever the amount levied under any such order shall have exceeded five hundred rupees, the Collector shall report the case specially to the Commissioner, and no further levy in respect of such fine shall be made otherwise than by authority of the Commissioner.

NOTE.—This section " must be held to apply in all butwarra cases." (Board's No. 363 A, dated 14th August 1880).

Fees, &c., to be deemed a demand under Bengal Act VII of 1868.

138. Except as herein expressly otherwise provided, all fees, fines, costs, and other sums ordered to be paid by any person under this Act, shall be deemed to be demands under* section 1 of Bengal Act VII of 1868 (*an Act to make further provision for the recovery of arrears of land revenue and public demands recoverable as arrears of land revenue*), and shall be leviable as such.

Power of Collector to enforce attendance of witnesses.

139. For the purpose of any enquiry under this Act, the Collector and Deputy Collector shall, in addition to every power conferred specially by this Act, have power to summon and enforce the attendance of witnesses, to examine witnesses, and to compel the production of documents by the same means (as far as may be), and in the same manner as is provided in the case of a Court under the Code of Civil Procedure.

Powers and functions assigned to Deputy Collector may be exercised by Collector.

140. All powers and functions which are assigned by this Act to a Deputy Collector may be exercised and discharged by the Collector ; and whenever it is provided by this Act that any act done, or order made by a Deputy Collector shall require the sanction of the Collector, or shall be appealable to the

* Repealed from this word to the end of this section See the first schedule of Act VII (B.C.) of 1880 and section 7 (3) of that Act.

Collector, if such act shall have been done or such order shall have been made by the Collector, it shall be deemed to have been sanctioned by the Collector or to have been confirmed by the Collector in appeal, as the case may be.

141. The Lieutenant-Governor may vest any Collector or Deputy Collector with all or any of the powers which, under the provisions of any law for the time being in force, might be exercised by them respectively, or might be conferred on them respectively, if they were making a settlement of the parent estate.

Government may vest Collector or Deputy Collector with certain powers.

Such powers may be conferred either generally in respect of all estates in the partition of which the Collector or Deputy Collector may at any time and in any district be engaged, or specially in respect of any particular estate.

142. An appeal, if presented within one month from the date of the order appealed against, shall lie to the Collector against every order of a Deputy Collector—

Appeal to the Collector.

(a) directing, under section forty-one, by whom the costs of an enquiry held in consequence of an objection preferred shall be paid;

(b) accepting or adopting any papers under section sixty-three for the purposes of a partition;

(c) refusing, under section sixty-eight, to confirm a partition made by the parties or by arbitrators;

(d) fixing, under section eighty-nine, the limits of land and the rent to be paid for it in perpetuity;

(e) refusing, under section one hundred and four, to make a partition as applied for by the joint applicants;

(f) passed under section one hundred and ten in respect of lands held rent-free, or under section one hundred and eleven in respect of lands included in a tenure;

(g) imposing a fine under section one hundred and thirty-seven.

143. An appeal, if presented to the Commissioner, or to the Collector for transmission to the Commissioner, within one month from the date of the order appealed against, shall lie to the Commissioner against every order of the Collector (whether such order be passed by the Collector in the first instance, or in appeal from the order of a Deputy Collector)

Appeal to the Commissioner.

(a) having the effect of rejecting an application for the partition of an estate, or for the separation of a share, or of putting an end to proceedings for effecting a partition or separation after the application has been admitted ;

(b) directing, under section thirty-one, that an application for partition or separation be admitted ;

(c) accepting or adopting any papers under section sixty-three for the purposes of a partition ;

(d) refusing, under section sixty-eight, to confirm a partition made by the parties or by arbitrators ;

(e) setting aside, amending, or approving the general arrangement of the partition under section seventy-five ;

(f) approving, with or without amendment, a partition made by a Deputy Collector, or directing such partition to be amended or a fresh partition to be made, or making a fresh partition under section eighty-one ;

(g) fixing, under section eighty-nine, the limits of land and the rent to be paid for it in perpetuity ;

(h) refusing, under section one hundred and two, to allow a partition to be made in accordance with an existing private division ;

(i) passed under section one hundred and ten in respect of lands held rent-free, or under section one hundred and eleven in respect of lands included in a tenure ;

(k) approving or disallowing, under section one hundred and fourteen, the allotment to the estate under partition of a portion* of lands held in common tenancy between the proprietors of such estate and the proprietors of one or more other estates ;

(l) passed under section one hundred and sixteen as to disputes or doubts regarding land ;

(m) imposing or confirming the imposition of a fine under section one hundred and thirty-seven ;

(n) imposing any fine amounting to more than fifty rupees, or directing the payment of any costs amounting to more than fifty rupees.

Appeal to the
Board.

144. An appeal, if presented to the Board, or to the Commissioner for transmission to the Board, within six weeks from the date of the order appealed against, shall lie to the Board

against every order of the Commissioner which confirms, modifies, or reverses any order of the Collector

(a) having the effect of rejecting an application for the partition of an estate, or for the separation of a share, or of putting an end to proceedings for effecting a partition or separation after the application has been admitted ;

(b) directing, under section thirty-one, that an application for partition or separation be admitted ;

(c) accepting or adopting any papers under section sixty-three for the purposes of a partition ;

(d) approving or disallowing, under section one hundred and fourteen, the allotment to the estate under partition of a portion of lands held in common tenancy between the proprietors of such estate and the proprietors of one or more other estates : and against every order of the Commissioner.

(e) directing, under section forty, that any proprietor shall pay more than his proportionate share of the expenses of a partition, when the excess which he is ordered to pay exceeds five hundred rupees ;

(f) directing, under section one hundred and thirteen, that any sum shall be paid by the proprietor of an estate other than the estate under partition, when such sum exceeds five hundred rupees ;

(g) confirming, under section one hundred and eighteen or section one hundred and twenty, or amending or setting aside, under section one hundred and twenty, a partition as made by the Collector ;

(j) imposing, or confirming the imposition of any fine amounting to five hundred rupees, or ordering or confirming an order directing the payment of any costs amounting to more than five hundred rupees.

NOTE 1.—There is no appeal, as of right, to the Board under this section against the order of a Commissioner in connexion with orders passed by the Collector under section 75 as to the general arrangement of a partition. Against such orders appeals are not admitted on the Board's file except on special cause shown. (Board's Proceedings of 19th March 1886, No. 113, Collection 7, File 118.)

NOTE 2.—A dispute as to the rent of one small plot of land was not considered as bringing the case within clause (c) of this section. *Prima facie* there were no special grounds shown for any interference by the

Board under section 145. (Board's Proceedings of 8th May 1886, No. 50 Collection 7, File 189.)

NOTE 3.—There is no appeal, as of right, to the Board from an order of the Commissioner against an order of the Collector under section 116 of the Act as to disputes or doubts regarding land. (Board's Proceedings of 30th July 1887, No. 80, Collection 7, File 251.)

NOTE 4.—This section was held not to apply to proceedings which had been finally completed under Regulation XIX of 1814. (Board's Proceedings of 25th August 1888, No. 64, Collection 158, File 7.)

No appeal to lie against any order passed under this Act.

145. Except as provided in the three last preceding sections, no appeal shall lie as of right against any order passed under this Act by any officer; but the proceedings and orders of every Deputy Collector under this Act shall be subject to the supervision and control of the Collector; the proceedings and orders of every Deputy Collector and of the Collector to the supervision and control of the Commissioner; and the proceedings and orders of all revenue officers to the supervision and control of the Board;

and any order passed and anything done under this Act may be modified, amended, or reversed by the supervising and controlling authority at any time, before possession of their respective separate estates has been given to the several proprietors as provided in section one hundred and twenty-three, but not after such possession has been given except as provided in the next succeeding section.

NOTE.—A Commissioner, without going into the merits of a case, decided on appeal a preliminary objection, and against his order an appeal was preferred to the Board. It was held that, apart from the fact that the parties agreed to the Board's entering into the merits of the case, this section fully authorized the Board to do so, when dealing with the appeal regarding the preliminary objection. (Board's Proceedings of 20th February 1886, No. 97, Collection 2, File 630.)

Proceedings connected with giving possession may be set aside within three months of date of giving possession.

146. Any proceedings of a revenue officer connected with giving possession to the proprietors of their respective separate estates as provided in section one hundred and twenty three may be set aside or amended as above provided by any supervising and controlling revenue authority, provided that such supervising and controlling authority shall, within three months of the date on which such possession may have been given, make an order to the effect that such proceedings are under the consideration of such authority.

Such order shall be communicated to the Collector of the district, who shall cause the same to be published by notification in the manner prescribed by section one hundred and thirty-four.

NOTE.—At the time of giving possession, the Amin proceeded to divide the trees standing on the estate among the several proprietors, whereupon an objection was raised by certain sharers to the effect that the trees standing on their plot should be left entirely in their sole possession, as they should go with the lands on which they stood. The Deputy Collector held that the value of the trees had not been included in the assets of the land according to the practice there in vogue, and that they should therefore be separately divided among the parties. The Collector confirmed this order, dismissing the appeal. Against the above orders an appeal was preferred to the Commissioner, who decreed it on the ground that it would be impossible to put one proprietor in possession of a certain plot of land, and to put other proprietors in possession of different trees which were growing upon that plot of land. On appeal this view was upheld by the Board as in accordance with fairness and common sense. (Board's Proceedings of 27th March 1886, No. 46, Collection 7, File 1485.)

147. The Commissioner and the Board may pass such orders as they shall think fit in respect of the payment of costs of any appeal which is made to them respectively under this Act. Orders as to costs on appeal.

NOTE.—A pleader, who was engaged in a partition case, having taken 20 years' purchase as the valuation of his claim for his fee, the question how the valuation should be made in partition cases in Revenue offices was referred to the Board, who pointed out that in partition proceedings before Revenue officers in calculating such fees the rules prescribed by the Board under the Legal Practitioners' Act XVII of 1879 should be observed. (Board's Proceedings of 19th May 1883, No. 23, Collection 7, File 221.)

148. If, in any case in which a Collector or other officer shall exercise jurisdiction under this Act, any person is guilty of the offence of giving or fabricating false evidence, or of forgery, as defined in the Indian Penal Code, or of abetting any of those offences, such Collector or other officer shall have the same powers in respect of such offence, and of the person charged with committing the same, as are vested by the Code of Criminal Procedure in a civil court, when any such offence is committed before or against such court, or when a document believed to be a forgery is given in evidence in any proceedings in such court. Powers of officers exercising jurisdiction under this Act with regard to false evidence.

Orders of revenue officer which are not liable to be set aside by civil suit.

149. No order of a revenue officer

(a) refusing to allow a partition on the grounds mentioned in section eleven ;

(b) rejecting or directing to be amended, an application under section twenty ;

(c) made under the first clause of section thirty-two ;

(d) made under Part IV, Part V, Part VI, Part VII, Part VIII (except as provided in the next succeeding section), or Part IX.

(e) imposing a fine ;

(f) in respect of the payment of costs of any appeal under section one hundred and forty-seven,

shall be liable to be contested or set aside by a suit in any court, or in any manner other than as is expressly provided in this Act.

When suit may be brought to set aside order of revenue officer.

150. Notwithstanding anything contained in clause (d) of the last preceding section, any person claiming a greater interest in any lands which were held in common tenancy between two or more estates than has been assigned to him by the order of a revenue officer under section one hundred and twelve or section one hundred and fourteen ;

and any person who is aggrieved by any order of a revenue officer passed under section one hundred and sixteen ;

may bring a suit in a court of competent jurisdiction to modify or set aside such orders of the revenue officer.

Board to be guided by instructions of Lieutenant-Governor.

151. In the execution of the duties vested in the Board by this Act, the Board shall be guided by such order or instructions as they may from time to time receive from the Lieutenant-Governor.

Board may lay down rules.

152. The Board may, from time to time, make rules, not being inconsistent with this Act—

(a) to regulate the expenses of effecting partitions, or the amount of fees to be levied in respect of partitions, the allotment of the same among the proprietors, and the instalments in which, and the times at which, the same shall be levied under Part IV ;

(b) to regulate the receipts, disbursements, and management of any " Estates' Partition Fund" formed under section forty-five ;

(c) to regulate the employment and remuneration of amins and other subordinate officers appointed under Part IV, to enable the officer making the partition to keep himself informed of the proceedings of such officers, and to exercise a proper control over them ;

(d) to regulate the form in which the partition papers shall be framed under section sixty-six and section seventy-seven ;

(e) and generally for the guidance of officers in conducting partitions under this Act.

SCHEDULE.

See Section 2.

Number and year.	Subject or abbreviated title.	Extent of repeal.
Regulation XI of 1811	For extending period of revising jumma on certain lands.	So much as has not been repealed.
Regulation XIX of 1814	Consolidating Regulations respecting Partition of Estates.	Ditto.
Act XX of 1836 ...	Quashing of Butwarra's.	Ditto.
Act XI of 1838 ...	Remuneration of persons effecting a partition.	Ditto.

RULES

UNDER SECTION 152 OF ACT VIII (B. C.) OF 1876, FRAMED BY
THE BOARD FOR THE GUIDANCE OF OFFICERS IN CONDUCTING
PARTITIONS UNDER THAT ACT.

1. All notifications under this Act shall be published, and all notices shall usually be served, by means of the nazirs' peons, fees being charged on the scale prescribed for the service of non-judicial processes and denoted in the usual way by adhesive stamps. When a notice is served by post under section 135, clause 2, the actual cost of postage only shall be charged and denoted upon the cover in postage stamps. Service labels should not be used.

Manner of
publishing
and serving
notices, &c.

"1A. Before publishing the notification under section 21, the Collector shall record a proceeding, specifying under which of the clauses of section 9 the application and the office-reports on it show the case to fall, and certifying that the case is not barred, so far as appears from the above papers, under sections 10 or 12 of the Act." 7-5-93. „ *

Prepayment
of fees.

2. Before publishing a notification under section 21 and issuing a notice under section 22, the Collector shall require the proper amount of fees to be paid by the applicant under section 17. If the application is admitted under section 31, the fees thus paid will be included in the expenses of partition under heading b of sections 44 and 49, and the expense incurred in the publication of this notification and service of this summons should be taken as a basis for the calculation of the expense to be incurred on account of the other notifications and notices which are required by the Act.

Payment of
costs of par-
tition by ins-
talments.

3. Under section 39 the estimated cost of a partition shall be paid in not less than three instalments, of which the first shall consist of one-half of the total amount estimated. The first instalment should be demanded by the Collector as soon as the estimate required by section 39 has been passed by the Collector, and the remaining instalments at such times as the Collector may think fit. Every instalment shall be paid within one month from the date on which a demand for it shall have been served upon the person or the accredited agent of the person from whom it is due, and, in the event of non-payment within one month from such date, the Collector shall proceed to levy the amount under section 138.

Proportional
debit of cer-
tain costs to
estates

4. The cost of peshkars and other superior officers employed by the Collector under the latter part of section 37 shall be borne by the several estates for whose benefit they are employed in proportion to the amount of the sudder jumma of each estate.

and of certain
establish-
ments.

5. The yearly cost in any district of an establishment employed under section 38, and of any Deputy Collector employed under section 43, shall be borne by all estates for the time being under partition in the said district in proportion to the amount of the sudder jumma of each estate. Similarly, the yearly cost of an establishment employed under section 38

in the office of any Commissioner will be borne by the estates under partition in his division in proportion to the amount of the sudder jumma of each estate.

6. At the commencement of each year the Collector shall submit to the Commissioner, in duplicate, a list of all estates under partition in his district, with the amount of their respective sudder jummas, and the Commissioner shall then determine the amount to be borne under rule 8 by each estate on account of the establishment employed in his office under section 38, and enter the same in the several district lists, returning one copy of each to the Collector by whom it was submitted.

List of estates under partition to be prepared annually.

7. Estimates under section 44 shall be prepared in the Form, A, annexed :—

Preparation of estimates.

(a)—In estimating the probable cost of the measuring establishment required, careful consideration should be given not only to the size of the estate, but also to its compactness or the reverse, the number of separate shares to be formed, and similar circumstances. It should be borne in mind that in cases where no superior officers are employed under the latter part of section 37, and where there is no district establishment under section 38, it may be necessary to retain the services of the amin, not only for measurement, but until the proceedings of the partition are completed by the Collector.

NOTE.—In certain districts of the Patna Division the Board have sanctioned the employment ofamins permanently on fixed salaries as mohurrirs in the offices of the Butwarra Deputy Collectors to prepare measurement papers, maps, rent-rolls, &c., and other office work, leaving the field-work to be performed by extra amins for so long as they are required. The establishments are sanctioned from year to year. (Board's Proceedings of 22nd May 1886, No. 98, Collection No. 10, file No. 216.)

(b)—Under the head of contingent expenses provision should be made for the service of the notices and the publication of the notifications likely to be required.

Contingent expenses.

8. The Board, under section 46, direct that, until further orders, the charges on account of partitions in districts where an Estates' Partition Fund is established shall be levied ac-

Levy of charges for partitions.

cording to the estimate in each case as provided in sections 39 and 40, subject to final adjustment under section 42, the salary of any Deputy Collector who may be appointed under section 43 being included under the head of special district establishments.

Scale of charges.

"9. The following maximum scale of charges, including expenses of all kinds (*i.e.*, amin's fees, cost of instruments and other contingencies, costs of supervision, &c.), is prescribed for guidance :—

First 100 acres	...	1 rupee per acre,
Second 100 "	...	14 annas "
Third 100 "	...	12 " "
Fourth and fifth 100 acres	...	10 " "
Sixth 100 acres	...	8 " "
All subsequent 100 acres	...	8 " "

and a fee of Re. 1 per day to the amin for every day he is engaged subsequently on local enquiries and reports.

If the Collector should consider in any case that a higher scale is required, he must report the exceptional circumstances to the Commissioner for sanction. If the excess is more than 25 per cent. of the ordinary scale, or amounts to more than Rs. 1,000 in all, the Commissioner will report the case for the orders of the Board.

Qualifications of Amins.

"10. As a general rule amins appointed to make measurements in partition cases must be capable of surveying with the plane-table and chain according to the system described in the Board's Survey Manual, Chapter VIII, and Appendix V to that Manual.

[NOTE.—It should always be possible to procure amins possessing these qualifications in Bihar, Orissa and the districts of Eastern Bengal, in which there have been professional surveys on a large scale. Amins not possessing these qualifications are not to be employed without the special sanction of the Board.]

Qualifications of Peshkars.

"11. Peshkars employed to supervise or check the work of amins must always be qualified as amins, and should ordinarily have acted as amins in practical surveys.

Rates to be paid.

"12. The rates to be paid to amins should be so fixed as to allow those officers not less than Rs. 30 per mensem, exclusive of the wages of chainmen, of whom three will be required

for each amin, and of other contingent charges. For this remuneration an amin will ordinarily be expected to survey and prepare the measurement papers of 200 acres a month. For other work connected with partitions, such as enquiry into objections, the remuneration to be allowed should be as nearly as possible analogous.

In the case of petty estates, such as would occupy an amin less than a month, the Collector may at his discretion allow the amin a rupee per diem.

" 13. In reckoning the remuneration of an amin, a reasonable time must be given for going to and from the estate. Reckoning of remuneration.

" 14. The forms of khatians and khasras prescribed by the Rules under the Tenancy Act should be used, omitting the columns relating to rent settled and special incidents of the tenancy, and the rules for filling up those forms should be adhered to as closely as the circumstances permit. Forms of khatians and khasras.

" 15. Before an amin is deputed to make measurements, the Deputy Collector or other superior officer in charge of the partition shall prescribe the time within which the measurement is to be completed. He may also prescribe the time within which any portion of the measurement is to be completed. He should from time to time call for progress reports, and insist on their punctual submission. The following or some similar form may be adopted :— Time to be prescribed.

1. Total area allotted to amin for survey.
2. Surveyed up to date and covered by last report.
3. Surveyed during the period under report.
4. Total area surveyed.
5. Area which should have been surveyed according to the scale laid down by the Deputy Collector.
6. Explanation of any deficiency.

" 16. The whole remuneration of an amin should not be paid to him until his papers have been examined and passed as correct. The officer in charge of the partition should see that the amin is not permitted to remain on the estate without reason or make unnecessary delay in filing his papers. Advances not exceeding two-thirds of the remuneration earned may from time to time be given at the discretion of the officer in charge of the partition. He will be responsible for seeing that no un- Advances to be granted.

reasonable delay occurs in examining the amin's work and settling his accounts.

The same rule applies, *mutatis mutandis*, to peshkars and other officers.

Instruments.

"17. The instruments required by the amins are described on page 86 of the Survey Manual, and may be indented for from the Mathematical Instrument Department.

Measurements to be tested.

"18. It is expected that, in all but unimportant cases, the officer in charge of the partitions should visit the estate and test the measurement and other records generally following (so far as it applies) the procedure prescribed for the guidance of Settlement Officers.

Survey records to be utilised.

"19. Whenever a professional or other trustworthy survey or record of rights has been made, the Collector will see that it is utilised so far as may be possible. He will also bear in mind that whenever a record of rights and settlement of rents have been made, these are binding on all parties so long as they are in force, and must be accepted as the basis of partition. In such cases it will be merely necessary to bring the records up to date and to assess for the purposes of the partition such lands of the estate as have not been assessed by the Settlement Officer." 10-6-92.

Supplementary estimates.

20. Whenever the amount first estimated for any partition is found to be insufficient, a supplementary estimate in the same form A as the original estimate may be passed by the Collector. Two or more supplementary estimates may, if necessary, be made. Rules 7 and 8 apply to supplementary as well as to original estimates.

Special proceedings as to cost.

21. Any special proceedings as to costs under sections 40-41 should be reported to the Commissioner of the division, and should be specially mentioned in the final report of the partition.

Abstract of Fund.

22. The abstract of the Estates' Partition Fund required by section 48 shall be in the form, B, annexed.

Ledger form.

23. In order to check the expenditure incurred in each case, an account should be kept up in each district in which any estate is under partition in Ledger form (see Appendix), showing separately in opposite columns the receipts and disbursements on account of each separate estate. Besides this

General Register of receipts, &c.

book a general register of receipts and disbursements on account of the Estates' Partition Fund generally should be kept up in every district in which such a fund has been established.

24. The partition paper referred to in section 77 shall be drawn up as nearly as possible in the form, C, annexed. Partition paper.

"24A. Early in April of each year the Commissioner will prepare an account of the total actual expenditure incurred during the last official year on account of the butwarra establishment entertained in his office, and apportion it among the several districts in his division, and will communicate these figures to the district officers concerned for insertion in their Partition Fund accounts, and abstract annual statements of Partition Fund which should be prepared under section 48 of the Estates Partition Act, VIII (B.C.) of 1876, with a note that the amount was drawn by him direct from the treasury. Copy of this account will also be furnished to the Accountant-General, Bengal, for adjustment of the Partition Fund accounts of each district in his office." 9-11-94.

25. A Progress form, D, has been prescribed by the Board, for adoption in certain districts, to show the progress made in the disposal of Butwarra cases during a quarter, as compared with the two preceding quarters. Progress Form.

"25A. At the close of each financial year, the Collectors should submit through the Commissioners to the Board a statement in the form of Return XXVIIA in the Appendix, showing the expenditure incurred and the average cost per acre of the land partitioned in their districts." 2-9-90. Return of average cost.

26. Security for the faithful discharge of their duties may, when the Collector thinks this necessary, be taken from amins and peshkars. When security is taken, the bond should be registered, and the registration fee should be treated as forming part of the contingent expenses of the partition. The amin and peshkar shall submit a report once a month, or more frequently if the Collector thinks fit in any case, showing the progress made in the partition proceedings of each case. Security, and bond.

27. The most convenient date to be fixed under section 123 as that from which separate liability of the new estates will commence will be the day following the next latest day for the payment of revenue. The Collector should therefore Commencement of separate liability of new estates.

endeavour to arrange the date for making over possession in such a way that it may be possible to fix a latest day of payment in the notice consistently with the provisions of section 124. It will be seen that, even at this stage of the case, after possession has been given, a sale of the parent estate for arrears will render all partition proceedings null and void (section 15).

No fee on completion of partition.

28. Regulation XV of 1797 having been repealed, no fee is now leviable on the completion of a division except the stamp on which the partition paper has to be engrossed.

Entry in roll of new estates.

29. The mode in which the newly-formed estates are to be entered on the Roll is described in Chapter IV, Section VII of the Board's Rules, 1888. Register 2 contains a column for the General Register numbers of the newly-formed estates, and if this column is properly filled up, there can be no danger of the separated shares being lost sight of.

30. A partition case will be kept upon the Collector's file—

- (i) until any appeal against the proceedings of the Revenue officers under section 123 has been decided, or until three months have elapsed without any order being made under section 146;
- (ii) until the date prescribed in the notice for the commencement of separate liability has elapsed and the Towjih Navis has certified that the joint estate is not in arrears, or, if in arrears, until the arrear has been recovered;
- (iii) if any expenditure has been incurred in the construction of boundary marks under section 126, until the cost of erecting such boundary marks has been recovered.

On these three conditions being fulfilled, the partition will be treated as completed and the case removed from the file.

Objections in certain cases

31. The law (section 116) appears to contemplate that objections to the effect that lands under division do not form part of the parent estate will be made before the partition has been approved by the Collector under section 81. It is possible, however, that objections worthy of consideration may be made at a later stage; but such objections should not be

entertained after a partition has been finally confirmed under section 122. The objectors should be referred for their remedy to the Civil Court.

32. With a view to ensure the personal attention of Revenue Officers to the proper making up of the record of a partition case, and to enable them to see at once the progress of every such case from its institution to its close, the Board have directed an Order-sheet to be attached to each record: See Circular Order No. 6 of January 1889 in the Appendix.

33. The numerous forms of notices, &c., in use in butwarra proceedings are not printed and supplied by the Superintendent of Stationery. It has been ruled that, as a Butwarra pays its own expenses, the notices, &c., should be issued in manuscript, the cost being met in the same way as other charges connected with butwarras. As it is within the competency of a Commissioner to sanction any butwarra charge, a Commissioner has been authorised to have the forms printed at a local press, apportioning the expenditure to all the estates under partition.

A.
[See Rule 7.]
I.—Statement showing the estimated cost of partition to be levied under section 39 of Act VIII (B.C.) of 1876.

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18
Number of estate in register.	Name of estate.	Registered proprietors.	Government revenue.	Area by survey, or, if the district has not been surveyed, the estimated area.	Name of estate and revenue at the period of the decennial settlement.	Petitioner's name.	Shares into which it is at present proposed to divide the estate, with the names of the respective proprietors.	Names of Peshkars and amins employed, and time likely to be taken up in measurement and other proceedings under section 54.	Rate of pay, and total cost of establishment shown in column 10.	Yearly and total cost of contribution towards establishments employed under the latter part of section 37.	Yearly and total cost of contribution towards district establishments employed under sections 38 and 43.	Yearly and total cost of contribution towards district establishments employed under sec. 38.	Other expenditure likely to be incurred (if any) in detail.	Total estimated cost of partition (columns 11 to 14).	Apportionment of cost to each proprietor.	Instalments and times at which it is proposed to levy the cost.	REMARKS.

B.
[See Rule 12.]
Abstract of the Partition Fund of district , for the year (B.C.) of 1876.

Receipts.	Rs. A. P.	Disbursements.	Rs. A. P.
Balance in hand on 1st April 18	Contribution towards establishments employed in the Commissioner's Office under section 38 of the Act.	
Received on account of estate	Salary of Deputy Collector employed under-section 43 of the Act.	
		Salary of district establishment employed under section 38 of the Act.	
		Cost of establishments employed under section 37 of the Act.	
		" Pension and leave allowances."	.. ..
		Contingent expenditure .. ..	.. ..
		Balance in hand on 31st March 18	.. ..
Total		Total	

C.

[See Rule 14.]

Partition Statement of estate bearing No. in the townjith of district prepared as required by section 77 of Act VIII (B.C.) of 1876.

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16
Names of recorded proprietors.	Quantity of land.	Average rental for one year as per amil's paper.	Average rental for three years from to patwar's papers, &c.	Other assets, if any.	Grosser jumma of entire estate.	Market-value of entire estate.	Fractional shares of the several proprietors or villages held in severalty or shares in such villages.	Names of proprietors.	Quantity of land assigned to each shareholder.	Produce of each partition as per one year's papers filed by the amil.	Produce of each separate estate as per three years' papers filed by the patwar.	Jumma of each separate estate.	Townjith number of each separate estate.	Date of Commissioner's confirmation.	REMARKS.
B.	C. Ch. K.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.			Rs. A. P.	Rs. A. P.	Rs. A. P.	Rs. A. P.		

The market-value should be ascertained by multiplying the net-profits of the estate by the number of year's purchase which is usually paid in the district for lands of a similar description.

The North Western Provinces Land Revenue ACT XIX OF 1873 . .

AS AMENDED BY ACTS I AND VIII OF 1879, XII OF 1881,
XIII AND XIV OF 1882, XX OF 1890 AND XII OF 1891.

PARTITION AND UNION OF MAHALS.

- Partitions.** 107. Partition is either perfect or imperfect.
- ' Perfect partition.'** ' Perfect partition ' means the division of a mahal into two or more mahals.
- The word ' mahal ' is defined in sec 3 cl (1) thus :—
- ' Mahal.'** (1) " Mahal " means—
- (a) any local area held under a separate engagement for the payment of the land-revenue, and for which a separate record-of-rights has been framed ;
- (b) any local area of which the revenue has been assigned or redeemed, and for which a separate record-of-rights has been framed ; and
- (c) for such purposes as the Local Government may from time to time determine, any grant of land made heretofore or hereafter under the waste land rules for the time being in force. (This last clause has been added to the original Act by Act VIII of 1879.)
- ' Imperfect partition '** ' Imperfect partition ' means the ' division ' of any property into two or more properties, jointly responsible for the revenue assessed on the whole.
- Persons entitled to perfect partition.** 108. Any recorded co-sharer in a mahal, and any person in whose favour a decree has been passed by any Civil Court, awarding to him the proprietary right in a portion of a mahal, whether such portion consists of a fractional share in the whole or a part of the mahal, or of specific lands, is entitled to claim perfect partition of his share.
- Any two or more recorded co-sharers may claim that their shares be divided from the other shares by a perfect partition, and be held by them as a single mahal.
- . . A division of an isolated plot cannot be properly called either a " perfect " or " imperfect " partition within the meaning of section 107 and 135 of the Land-Revenue Act. The law as to partition by Revenue Authorities of estates paying revenue to Government was consolidated

in Regulation 19 of 1814 which was repealed by Act XIX of 1863, which in its turn was repealed by this Act which is the present law on the subject. These enactments relate to such partitions of an estate paying revenue to Government as would affect the interest of the Government in the imposition, apportionment or collection of revenue. They cannot be understood to bar the inherent power of the Civil Court to apportion an isolated piece of land (Ram Dayal v. Megu Lal, 11 L. R. 6 All 452).

The words "recorded co-sharer" in section 108 include a recorded mortgagor as well as mortgagee, and unless the recorded mortgagor joins with the mortgagee in possession the Court can refuse the partition (Badam Sing v. Nand Kishore, B. S. D. 1885—87, p. 35).

109. Applications for perfect partition are to be made in writing to the Collector of the District or the Assistant Collector in charge of the sub-division of the district in which the mahal is situated ;

Applications for perfect partition.

and shall be accompanied by a certified copy of the record, showing the share held by the applicant in the mahal :

Provided that, if the mahal be situated in two or more districts, the application may be made in any one of those districts, and the partition shall be made by such one of the Collectors of those districts as the Board may direct.

Provision as to estates situated in more than one district ;

The record filed under section 109 ought to be a certified copy of the record of rights showing the names of co-sharers, their several interests, and the revenue, so that there be no difficulty in issuing the notices required.

The following are the Rules issued by the Board of Revenue regulating the procedure to be observed by officers in making partitions :—

PART I.—PROCEDURE.

1. If two or more co-sharers apply at the same time for separate partition of their shares in the mahal, their applications shall be dealt with together ; but if during the progress of a partition a co-sharer who has not joined in the original application files an application for partition of his share, such application shall be separately dealt with, unless it shall have been filed before the expiry of the term allowed by the notification issued under section 111 of Act XIX of 1873.

2. The copy of the record filed under section 109 shall be a certified copy of the whole khewat of the mahal.

3. If the application is not in order or is open to objection on the face of it, it should be rejected or returned for amendment. If it is in order and not open to objection, the order for issue of the notification and notices required under section 111 of the Act shall be passed, and the applicant shall be informed of the costs and required to pay them into

the Court within a given time. The period fixed by the notification for the filing of objections shall not ordinarily exceed 40 days.

4. During the term allowed by the notification, the record-keeper shall be called upon to certify that no changes in the register have been made or ordered since the copy of the khewat was given to the applicant. He shall also be required to state how the constitution of the mahal was defined in the settlement record-of-rights, and to quote any provisions regarding partition therein contained. Within the same period the registrar-kanungo shall furnish copies of the milan khasra (Part I of the Village Register) and of Parts I and II of the Mahal Register (rental demand and collections, and classification of holdings). These shall be paid for out of the general costs of the partition, and shall form a part of the record. The officer making the partition shall call for the pargana book, and cause all entries in it which may be of use to be copied and filed with the proceedings. He shall also send for the jumabandis of the mahal for the past three years.

5. On the day specified in the notice any objections made under section 112 will be taken up and formally inquired into (section 215 lays down the method of taking the evidence in these cases). The officer making the partition shall use the same diligence and strictness in disposing of the objections as he would in trying an ordinary revenue case.

6. If the objection is found to raise any question of title or proprietary right, the officer making the partition must proceed under section 113.

7. If there are no objections, or if the objections have been disposed of, the officer making the partition will record an order under section 116, deciding that the partition is to be made, and will summon all the co-sharers in the mahal and the patwari to attend on a date to be specified in the order. This date shall not ordinarily be less than 15 or more than 30 days from the date of the final disposal of objections. The summons to the patwari shall require him to bring the village map, together with the khasras of the past and current years, and the bahikhata, bujharat and khewat.

8. On the date so fixed, if the applicant does not attend, the case may be struck off, and any costs that have been paid may be returned. If the applicant appear, he and such of the co-sharers who are present and the patwari shall be examined as to the constitution of the mahal and the manner in which the partition is to be effected. The existence of sir, baghs, dwelling-houses, tanks, wells, watercourses, graveyards, temples and the like, about which difficulties are likely to arise, shall be carefully ascertained, and, so far as possible, the wishes and consent of the parties as to the mode of dealing with them shall be recorded; any disputes arising during this inquiry shall be settled or overruled by the officer making the partition.

9. A formal proceeding will then be drawn up, laying down all the particulars of the partition, specifying the lands in the mahal, the lands held in common, the lands held in severalty; describing what lands are to be divided and what left as they are; and laying down definite rules for dividing the lands with regard to the quality of soil, class of tenants or other circumstances affecting their value, and for dealing with all matters coming under sections 124, 125, 126 and 127. This proceeding shall be called the "partition proceeding." A table shewing all the principal points on which it is likely that instructions may be wanted has been prepared under the order of the Board, and is appended to this circular. It should be consulted by every officer drawing up a partition proceeding, and he should ascertain by reference to the sharers in the Court that no point has been overlooked. At the time of drawing up the partition proceeding, the officer making the partition shall ascertain whether the present map is serviceable, or whether a fresh survey of the mahal must be made. The costs of partition shall be calculated and distributed as in Part II. Provided that if it is found in the course of the proceedings that the costs fixed at this stage are insufficient, the officer making the partition shall have powers at any subsequent stage to fix and apportion such additional costs as he may think necessary.

10. When the partition proceeding has been drawn up, it shall be carefully explained to all the co-sharers present, and their assent or dissent recorded and signatures attached. The costs as fixed in the preceding Rule shall then be realized.

11. When the case has been committed under section 237 to an Assistant Collector not exercising first class powers; that officer shall submit the partition proceeding with the record of the case to the Collector of the District for instructions. In all cases where the case is tried by an Assistant Collector of the first class, the Collector may by either general or special order direct that the partition proceeding be submitted to him before further action is taken.

12. The officer making the partition, or, if it has been submitted to him, the Collector shall decide under section 116 by whom the partition is to be made.

13. Should the parties be allowed to elect to make the partition themselves, or to appoint arbitrators for that purpose, the officer making the partition shall furnish them with such copies of the records as they may require, and shall fix a date on or before which they are to complete the partition.

14. If it has been ascertained at the inquiry held under section 9 that a new survey of the mahal is necessary, the officer making the partition shall appoint an amin to survey the mahal and prepare a new map and khasra. The khasra will contain the classification of soils as made at the last settlement.

15. If a new survey is not required, or, in the event of a survey being

necessary, after the preparation of the new map, an amin shall be appointed to execute the partition in all cases where it is not to be made either by the parties themselves or by arbitrators. At the same time an order will be issued to all the co-sharers, notifying the appointment of the amin and requiring them to attend him during the partition.

16. If a new survey is not required, a copy of the field map and khasra shall be given to the amin, who shall test the map field by field, and make any alteration or correction that may be needful. He shall also test and correct the recorded rental of the mahal.

17. On being appointed to execute the partition, the amin shall be furnished with a copy of the partition proceeding. The amin will be paid by results, and before he is sent to the village his total remuneration will be calculated with reference to the area, number of fields, number of shares to be divided and other points to be considered in connection with the operation. Payments not exceeding in all half his total remuneration may be made at any time during the operation at the discretion of the officer making the partition. The other half will be paid on the completion of the work. He shall report progress at such intervals, not ordinarily being more than a month apart, as may be prescribed by the officer making the partition. Any unreasonable delay will be made a cause of the removal of his name from the list of amins, and may entail the forfeiture of the whole or any part of the outstanding balance of his fees as the officer making the partition may direct.

18. Where the parties undertake the partition themselves, a date shall be fixed after consideration of all the facts of the case, within which the partition must be completed, and if the case is referred to arbitration, such date will be entered in the order of reference. The parties should be warned that if the partition is not completed by the date fixed, and no good reason is shown for the delay, the officer making the partition may rescind his order, permitting the partition to be made by the parties themselves or by arbitrators, and proceed to make it under his own orders.

19. On arriving at the village the amin shall go over the ground and make out such proposals of partition in the manner prescribed in the partition proceeding, marking out the proposed lots by coloured lines on the map and by earthen pillars on the ground, and making such rough schedules of the proposed lots as may be necessary. He shall then point out to all the parties concerned on the ground the way in which he proposes to divide the land, and shall hear their objections and make such alterations in his proposals as he may think necessary.

20. On completion of this work, the amin shall report progress to the officer making the partition, who will then issue a notice to all the parties, summoning them with the amin and patwari to appear before him on a day specified in the notice.

21. On the day specified, the officer making the partition shall

examine the amin's proposals in presence of the parties, and shall satisfy himself that the proposals are just, and are understood by all, concerned.

22. If all agree to the proposals or to such amended proposals as the officer making the partition may think fit to make, their agreement shall be recorded and attested by the officer making the partition. If any objections are raised, the officer making the partition shall hear them and record an order overruling them, or amending the proposals to meet them as he thinks fit. If it is found that the objections are such as cannot be disposed of on the same day, the officer making the partition may refer the case back to the amin for further report, and shall appoint a further day for hearing the case, informing all the parties present. If, on the further day fixed for hearing the objections, either party be not present, he may either dismiss the objections or allow them *ex parte* as the case may be, or pass any order that may seem justified by the evidence before him.

23. On the day fixed for hearing objections, or on any subsequent day to which the case may be adjourned for that purpose, the officer making the partition shall decide what rent is payable under sections 124 and 125 for the sites of houses and other buildings, and the sir land of one co-sharer, if any, which have been included in the mahal assigned to another co-sharer, and such rent shall be entered in the partition khasra. At the same time if any disputes remain undecided after the procedure enjoined in Rule 8, he should, if possible, decide all disputes on points referred to in sections 126 and 127, Act XIX of 1873.

24. When the proposals have been finally settled, either by agreement of the parties or order of the officer making the partition, that officer shall so sign or mark the coloured map that the boundaries of the proposed lots cannot be altered.

25. The map and rough schedule shall then be returned to the amin who shall forthwith make out in duplicate the records of the new mahals (or pattis), *i e*, the new mahalwar khasras, jamabandis and khewats, in the same form as the records prepared at last settlement. One complete set of the new records will then be despatched to the tahsil by the officer making the partition, and of these the copies of the khasras and jamabandis will be handed over to the patwari by the registrar-kanungo, on the former's first visit to the tahsil, after their receipt. The registrar-kanungo will at the same time require the patwari to copy for his own use the new khewat and will sign the copy. If a new map has been prepared under Rule 14, the amin in charge of the survey will prepare a duplicate copy, which will be sent to the tahsil with the other records, and the patwari will be required to make a copy for his own use, which will be signed, after examination, by the registrar-kanungo. If a new map has not been prepared, but the old map has merely been altered or corrected under Rule 16, the corrected map

should be sent in original to the tahsil, and the registrar-kanungo will see that the patwari copies the alterations or corrections on to both the tahsil map and his own copy, and will sign both maps when so corrected. The original map will then be returned for record in the Collector's office.

Parties who want copies of the new mahalwar papers must obtain them in the ordinary manner and at their own charge.

If the partition is perfect, the revenue of each of the new mahals shall be in even rupees, subject to the proviso to section 128, Act XIX of 1873.

26. The partition shall then be reported (if necessary under section 131), and the notification prescribed by that section shall be published. An English statement in Form I shall be drawn out, signed by the officer making the partition, and placed with the record.

27. Possession shall be given to the parties from the first day of July next following the date of such notification.

28. Before the commencement of the camping season the Collector should inspect the file of pending partition cases, and should arrange that either he, or one of his assistants in whose Court the case is, should visit any village in which from the length of time it has been pending or for any other reason a local inspection appears to be desirable.

29. The Collector of the District shall maintain under his own signature a list of duly qualified amins, and fix their number in such a way with reference to the ordinary partition work of his district that each amin should derive from it a fair average salary. Unless no amin on this list is out of employ, or likely to be out of employ within a fortnight, an officer making partitions shall always select the amin to be appointed under section 15 of these Rules from the men on the Collector's list. If none of these are available, an Assistant Collector making a partition shall report to the Collector the name of the man he proposes to appoint, and his reason for appointing him. If it is likely that any amin whose name is on the Collector's list may not find employment on partition cases, he may be deputed to assist in alluvion and diluvion cases where assistance is required; and shall have a preferential claim to such employment. The Collector may at any time remove the name of any amin from his list.

30. The officer making the partition under section 236, and any officer to whom a partition case has been referred under section 237, shall keep up in his own handwriting a brief history of the case, in which he shall record every order of whatever kind which he may give during the course of the proceedings, and make a note of all important objections and his decision on them. This record will be divided into the following parts, which must be kept distinct:—

(1) Proceedings between the filing of the original application and the order allowing (section 116 of Act XIX of 1873) or disallowing (section 112 of Act XIX of 1873) the partition.

(2) Proceedings between the order allowing the partition and the final completion of the partition proceeding.

(3) Proceedings from the appointment of the amin (or reference to the parties or arbitrators, as the case may be) and the filing of his partition proposals.

(4) Proceedings between the filing of the award and the final order of the Collector confirming the partition.

31. A register shall be maintained in each Court showing all the partition cases pending in it and giving the following information :—

(1) Date on which the case was brought on the register of this Court.

[A comparison of this with the subsequent dates will show at what stage of the proceedings a case instituted in another Court was transferred to the Court for which the register is maintained]

(2) Date on which application was filed.

(3) Date of issue of notification and notices under section 111.

(4) Date of final disposal of objections.

(5) Date of partition proceeding.

(6) Date of reference to amin (or arbitrators or parties).

(7) Date of receipt of award.

(8) Date of final order.

(9) Explanations.

32. A form for this register will be provided by the Board. It will be inspected by the Collector of the District once in three months, and he should call for explanations in all cases where unnecessary delay appears to have been permitted.

33. The officer in charge of a settlement shall have all the powers of the Collector of the District under these rules.

34. The Collector of the District shall report the state of the partition files in his district to the Commissioner half-yearly in Form II, and a similar report shall be made by the Commissioner to the Board regarding each district in his division.

PART II.—REGARDING THE COST OF PARTITION.

35. The costs shall be divided into two parts—costs of survey and costs of partition.

36. The costs of survey are, by section 129, to be paid rateably by co-sharers in the mahals according to their shares. Unless a new survey is made for the partition, no charge shall be made for such costs.

37. The costs of partition shall include every charge except that of the survey; and no extra fees shall be levied for copying, pointing out boundaries, or any other purpose. The costs of partition shall be paid rateably by all the co-sharers of the mahál according to their shares, unless it is otherwise expressly ordered by the Collector of the District: provided that any co-sharer obstructing or delaying the partition by frivolous objections, or other means, may be ordered to pay as costs any

sum not exceeding double the amount of costs due on his share : provided, also, that any co-sharer intervening under the 2nd clause of Rule I shall pay all such additional costs as his intervention may cause to be incurred.

38. The costs of the survey shall be calculated at Rs. 6-8-0 per 100 acres of total area, and for the survey of the village site at the rate of Rs 2 per acre or per 100 houses. The surveyor may be paid either according to the area measured or the time occupied by the survey, as the Collector of the District may think fit.

39. The costs of partition shall be calculated on the area of the land to be divided and on the number of classes of soil in such land and on the number of co-sharers, and shall not exceed the following scale :—

For any area not exceeding 150 acres, not more than Rs. 10			
From 150 and	200	"	15
" 200	300	"	20
" 300	500	"	30
" 500	800	"	40
" 800	1,000	"	50

For every 100 acres or part of 100 acres over 1,000 " 5

40. If the land to be divided consists (1) of two classes of soil, an addition may be made of 20 per cent. : (2) of three classes, 35 per cent. ; (3) of four or more, 50 per cent. to the above scale of charges.

41. If there are less than five co-sharers in the mahal, no addition shall be made to the costs on account of the number of co-sharers.

42. If there are from 5 to 10 co-sharers, an addition may be made of 10 per cent.

If there are from 10 to 20 co-sharers, an addition may be made of 20 per cent.

If there are from 20 to 30 co-sharers, an addition may be made of 30 per cent. And so on, provided that not more than 100 per cent. be added in any case on account of the number of co-sharers.

43. When the receipts are sufficient to stand the charge, one or more muharrirs may be appointed on such salaries not being below Rs. 15 or above Rs. 25 per mensem as the Collector may determine. Their duty will be to check the partition papers after they have been filed by the amins and, in the case of the appointment of a special partition officer, to act as his Court establishment for partition work generally. Ten per cent. shall be appropriated from the fees payable to the amins and shall constitute a fund from which the salaries of these muharrirs may be paid, and a personal ledger account for this item will be opened at the treasury. The services of the muharrirs employed under this Rule will not qualify for pension.

APPENDIX TO RULES FOR OFFICERS MAKING PARTITION.

*Points on which it may be necessary to give orders in framing a
Partition Proceeding.*

1. Into how many mahals the village is to be divided and the fractional share represented by each.

2. By whom the partition is to be made, by an amin, or by the parties themselves, or by arbitration.

3. Whether a new survey is required of the whole village or of any part of it, as, for instance, in the case of alluvion or diluvion which has not been sufficiently mapped

4. Whether the new mahals are to be compact blocks, and if not, how far and under what conditions and restrictions a khetbat division is to be allowed.

5. If any lands or other property are at the time held in severalty, how are they to be dealt with at partition ; and if they are to be retained by their present owners, on what principle is compensation to be given in making out the remaining mahals ?

6. The terms to be observed in dealing with—

- (1) sir,
 - (2) khudkasht of proprietors,
 - (3) occupancy and exproprietary land,
 - (4) tenants-at-will,
 - (5) rent-free and favoured tenures,
 - (6) groves (a) of proprietors,
(b) of tenants,
 - (7) houses (a) of proprietors,
(b) of tenants,
 - (8) places of worship and burning ghats,
 - (9) wild trees and jungle,
 - (10) grazing land and waste,
 - (11) irrigation from wells, tanks, bandhs, or streams or canals.
- The method of distribution, and the liability for repairs.
- (12) What roads are to be kept open with common right of way.

- (13) Any customs as to the right to manure.
- (14) Rights in bazars or camping-grounds.
- (15) Rights in fisheries, singhara, lac, kankar, saltpetre and other miscellaneous products.
- (16) Rights in threshing-floors, sugar yards, indigo factories, brick-kilns, ferries or boats and landing places.
- (17) The term within which the award is to be filed.
- (18) The method on which the payment of the costs of partition and stamp-duty on final proceedings is to be divided.

APPENDIX.

FORM I.

Statement of Partitions effected under Act XIX of 1873 in Zila.

No.	Pargana.	Mahal.	Names of Iambardars.	Total area.	Culturable, waste, and lately abandoned.	Irrigated.	Uncultivated.	Total.	Total malguzari area.	Government jama.	On total area.	On malguzari.	On cultivation.	No.	New mahals.	Rate per acre.	Area in acres according to the measurement of the amin.	Average collections of the past three years.	Government jama.	On total area.	On malguzari.	On cultivation.	Remarks.	Rate per acre.
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COLLECTORSHIP; }

The _____ 18 ____
Collector _____

FORM II.

Half-yearly Statement of Partition Cases.

[illegible]

110. If the mahal is situated in two or more sub-divisions of a district, the partition shall be made by such one of the Assistant Collectors respectively in charge of such sub-divisions as the Collector of the District may direct.

and as to estates in more than one sub-division.

111. The Collector of the District or Assistant Collector, on receiving an application for partition shall, if the application be in order and not open to objection on the face of it, publish a notification of the same at his office, and at some conspicuous place on the mahal to which the application relates,

Notification of application.

and shall serve a notice on all such of the recorded co-sharers in the mahal as have not joined in the application, requiring any co-sharer in possession who may object to the partition to appear before him to state his objection, either in person or by a duly authorized agent, on a day to be specified in the notice, not being less than thirty or more than sixty days from the date on which such notice was issued.

Notice to co-sharers not joining.

Where, from any cause, notice cannot be personally served on any co-sharer, the notification shall be deemed sufficient notice under this section.

Notification when alone sufficient.

112. If, on or before the day specified, any objection is made to the partition, by any co-sharer in possession, and the Collector of the District or Assistant Collector, on a consideration of such objection, is of opinion that there is any good and sufficient reason why the partition should be absolutely disallowed, he may refuse the application, recording the grounds of his refusal.

Power to refuse partition when objection admitted.

If the question of title or right thus raised has not been determined by a competent Court, the usual course will be to refuse the application if the matter at issue is at all complicated. But it is optional to the Collector to sit as a Civil Court and try the matter formally. The object of this provision is to at once dispose of the objections raised as to title, and more with the object to stop partition.

The Collector's order deciding an objection in the partition cases is appealable to the Commissioner (*Mahdi Ali v. Madho Singh*, B. F., No. 909 of 1879).

113. If the objection raises any question of title, or of proprietary right, which has not been already determined by a Court of competent jurisdiction, the Collector of the District or Assistant Collector may either decline to grant the application until the question in dispute has been determined by a com-

Procedure if question of title be raised.

petent Court, or he may proceed to inquire into the merits of the objection.

In the latter case the Collector of the District or Assistant Collector, after making the necessary inquiry and taking such evidence as may be adduced, shall record a proceeding declaring the nature and extent of the interests of the party or parties applying for the partition, and any other party or parties who may be affected thereby.

Procedure in
such cases.

Reference to
arbitration.

The procedure to be observed by the Collector of the District or Assistant Collector in trying such cases shall be that laid down in the Code of Civil Procedure for the trial of original suits, and he may with the consent of the parties refer any question arising in such case to arbitration, and the provisions of Chapter XXXVII (relative to arbitrators) of the same Code shall apply to such references.

(1). Where in the course of carrying out an order for a partition and of assigning the lands to each co-sharer, certain co-sharers claimed certain plots of land as belonging to them in severalty and demanded that the same should be assigned to them, and the Collector decided that some of such plots were held in severalty and one was held in common. *Held*, that his decision was not passed under section 113 of this Act, and was therefore not appealable under section 114 (*Shibban Lal v. Tiloki Chund*, 1880 I. L. R., 2 All., p. 619).

(2). In the case of an objection to a partition raising a question of title, it is only when the Collector or Assistant Collector records a proceeding declaring the rights of the parties, after an adjudication of the objection on its merits, that his order becomes an order under section 113 of Act XIX of 1873, within the meaning of section 114 of that Act. Where, therefore, an Assistant Collector made an order disallowing an objection to a partition raising the question of title, on the ground that each question had been determined against the objection in a suit for profits between the parties. *Held*, that such order was not a decision of a Court of Civil Judicature within the meaning of section 114 of this Act, but that it could be contested by a suit in the Civil Court (*Romesher Rai v. Subhoo Rai*, I. N. W. Ed. 1873 ; 134 ; *Bukhta v. Gunga*, 3 Agra, 161 ; and *Asghar Ali Shah v. Jhandamal*, I. L. R., 2 All., p. 839).

(3) A childless Hindu widow who has succeeded to her deceased husband's share of a mahal, such share having been his separate property and is recorded as a co-sharer of such mahal, is as much entitled, under section 108 of Act XIX of 1873 as any other recorded co-sharer is, to claim a perfect partition of her share. The circumstance that she may after partition alienate her share contrary to Hindu Law, will not

bar her right as a co-sharer to partition. If she acts contrary to the Hindu Law, in respect of her share, the reversioners will be at liberty to protect their own interests (*Jhunna Kuaer v. Chainsukh*, 1881 I. L. R. 3 All., 400).

(4) Where in proceedings for partition under Act XIX of 1873, a question of title to land is raised between the parties to the partition, and there is an adjudication of each question, such adjudication will operate as to bar to a suit between the same parties in the Civil Court to contest the title of each land, notwithstanding that in some respects such adjudication may have been irregular or defective, *Harshahai Mal v. Maharaj Singh*, I. L. R., 2 All. 294, and S. A. No. 129 of 1881, decided on the 27th July 1881, followed. Held in this case, on consideration of the partition proceedings, that the question of title raised therein had been adjudicated on, and therefore the rule mentioned above applied (*Bateshar Nath v. Faizul Hasan*, 1883 I. L. R., 5 All. p. 280).

(5) It is necessary to prepare a formal decree in proceedings under section 113, declaring the rights of the parties in a partition case (*Ranjit Singh v. Ilahi Bakhsh and others*, 1883 I. L. R., 5 All. 520.).

(6) A Revenue Court acting under the provisions of sections 112 and 113 of the Land-Revenue Act, recorded a proceeding declaring the nature and extent of the respective rights of the parties before the Court, and prescribing the mode in which partition should be effected. No decree was framed in accordance with this proceeding: *Held*, that the proceeding of the Revenue Court was a decision by a Court of competent jurisdiction, and could not be interfered with by a suit in the Civil Court disputing its correctness (*Bhola v. Ramdhin*, 1885 I. L. R. 7 All. 894).

(7) Upon an application made under Chapter IV of the Land-Revenue Act for partition of common land in which the owners of six *pattis* were interested, into six equal parts, an objection was raised that the land should be divided into parts proportionate to the size of the different *pattis*. The Assistant Collector disallowed it with reference to provisions of the *Wajib-ul-ars* in which the custom of the village was recorded, and made the partition in the manner prayed. No appeal was preferred by the objectors to the District Judge. The Collector confirmed the partition, and after an appeal to the Commissioner, the Assistant Collector's decision was upheld. The objectors then brought a suit in the Civil Court for a declaration that the defendants were only entitled to a share of the common land proportionate to the area of their *pattis*: *Held*, that the objection which was raised, in the Revenue Court was one which raised a question of title or of proprietary right in respect of the common land within the meaning of section 113 of the Land-Revenue Act; that the decision of the Assistant Collector was a decision within the meaning of section 114, and that consequently the suit was barred

by section 13 of the Civil Procedure Code : *Held*, also, that the question was not affected by any mistakes in procedure that had been made in the Revenue Courts (*Amir Singh v. Nimati Pershad*, I. L. R., All. p. 388).

(8) Reading together sections 111, 112 and 113 of the Land-Revenue Act as they must be read, the objection contemplated in each of them is an objection to be made by the person upon whom the notice required by section 111 is to be served, *i.e.*, a person who is a co-sharer in possession and who has not joined in the application for partition.

So far as sections 111, 112, 113, 114 and 115 are concerned, a Civil Court is the Court which has jurisdiction to adjudicate upon questions of title or proprietary right either in an original suit in cases in which the Assistant Collector or Collector does not proceed to enquire into the merits of an objection raising such a question under section 113, or an appeal in those cases in which the Assistant Collector or Collector does decide upon such questions raised by an objection made under section 112. The remaining sections relating to partition do not provide for or bar the jurisdiction of the Civil Court to adjudicate upon questions of title which may raise in partition proceedings or on the partition after the time specified in the notice published under section 111. Section 132 is not to be read as making the Commissioner the Court of Appeal from the Assistant Collector or the Collector upon such questions, nor does section 241 (f) bar the jurisdiction of the Civil Court to adjudicate upon them.

Where, therefore, after the day specified in the notice published by the Assistant Collector under section 111, and after an amin had made an apportionment of lands among the co-sharers of the mahal, the original applicants for partition raised for the first time an objection involving a question of title or proprietary right, and this objection was disallowed by the Assistant Collector and the partition made and confirmed by the Collector under section 131 : *Held*, that the objection was not one within the meaning of section 113, that the remedy of the objectors was not an appeal from the Collector's decision under section 132, and that a suit by them in the Civil Court to establish their title to the land allotted to other co-sharers was not barred by section 241 (f), and, with reference to section 11 of the Civil Procedure Code was maintainable (*Mohammed Abdul Karim v. Mahomed Shadikhan*, I. L. R. 9 All. 429).

Collector's
decision
equivalent to
decision of
Civil Court.

114. All orders and decisions passed by the Collector of the District or Assistant Collector under the last preceding section, for declaring the rights of parties, shall be held to be decisions of a Court of Civil Judicature of First Instance, and shall be open to appeal to the District or High Court, under the rules applicable to regular appeals to those Courts.

Upon such appeal being made, the District or High Court, as the case may be, may issue a precept to the Collector of the District or Assistant Collector, desiring him to stay the partition pending the decision of the appeal.

Appeal thereupon.
Appellate Court may stay partition.

115. From every decision passed under section one hundred and fourteen by a District Court, a special appeal shall lie to the High Court, under the rules for the time being in force relating to special appeals to that Court.

Special appeal to High Court;

116. When it has been decided to make a partition under this Chapter, the Collector of the District or Assistant Collector may give the parties the option of making the partition themselves, or of appointing arbitrators for the purpose; or he shall make the partition himself or cause it to be made by any Assistant Collector subordinate to him.

Option to parties to make partition themselves or to appoint arbitrators.

If arbitrators are appointed, the provisions of sections two hundred and twenty to two hundred and thirty-one, both inclusive, shall apply.

117. In making partitions, the Collector of the District or Assistant Collector, and any person appointed by him, shall have the same powers to enter on the land under partition, for marking out the boundaries, surveying the mahal, and other purposes, as have been conferred on Settlement Officers under Chapter III.

Power to enter on land for purposes of partition.

118. Where there are no lands held in common, the lands held in severalty by the applicant for partition shall be declared a separate mahal, and shall be separately assessed, to the Government revenue.

Partition of lands held only in severalty.

119. Where some of the lands are held in common, the Collector of the District or Assistant Collector shall allot to the applicant for partition his share of such lands in accordance with village-custom, if any such exist.

Partition of lands some of which are held in common.

If no such custom exist, the Collector of the District or Assistant Collector shall make such division as may secure to the applicant his fair portion of the common lands.

120. The portion of the common lands falling by such partition to the share of the applicant shall be added to the land held by him in severalty, and the mahals thus formed shall be assessed and declared separate mahals.

Formation of separate mahals from shares allotted in partition.

Transfers to be effectuated in making partition.

121. In making partitions under sections one hundred and eighteen, one hundred and nineteen and one hundred and twenty the Collector or Assistant Collector shall give effect to any transfer of lands held in severalty, forming part of the mahal, agreed to by the parties, and made previous to the declaration of the partition.

This section enables the parties to make any exchange of lands held in severalty that may be agreed to by them. The Act gives Collector no power to disturb possession. The lands held in severalty may be so intermixed as to render any sort of compactness in the new mahals impossible. If this is thought objectionable, the only course is to report to the Board under section 123. The land in separate possession of a co-sharer cannot be given to other co-sharers in partition without the consent of the former (*Debi v. Goburdhan*, B. F., No. 30 of 1879).

Partition where all lands held in common.

122. Where all the lands are held in common, the Collector of the District or Assistant Collector shall make such a partition as may secure to the applicant his fair share of the mahal.

Mahals to be compact; partition not to be disallowed for compactness.

123. In all cases each mahal shall be made as compact as possible: Provided that, except with the sanction of the Board, no partition be disallowed solely on the ground of incompactness.

* The attention of the Collectors has been drawn by the Board of Revenue to section 123, Act XIX of 1873, that in all cases of partition, the mahals shall be made as compact as possible. The Board shall not disallow partitions solely on the ground of incompactness, but they expect that compactness shall be carefully studied, and insisted on within reasonable degrees, and amins should not be allowed to make incompact partitions simply to save themselves trouble and to satisfy only, for a time, the contending parties (Circular letter No. B12-11 of 15th December 1890 from the Board to all Commissioners).

Rule when dwelling-house of one sharer is included in mahal assigned to another.

124. If in making the partition it be necessary to include in the mahal assigned to one sharer, the land occupied by a dwelling-house or other building in the possession of another co-sharer, such other co-sharer shall be allowed to retain it, with any buildings thereon, on condition of his paying a reasonable ground-rent for it to the sharer into whose portion it may fall.

The limits of such land, and the rent to be paid for it, shall be fixed by the Collector of the District or Assistant Collector.

125. No sir land belonging to any co-sharer shall be included in the mahal assigned on partition to another co-sharer, unless with the consent of the co-sharer who cultivates it, or unless the partition cannot otherwise be conveniently carried out.

Rule as to sir land of one sharer being included in mahal assigned to another.

If such land be so included, and after partition such co-sharer continue to cultivate it, he shall be an occupancy-tenant of such land, and his rent shall be fixed by order of the Collector of the District or of the Assistant Collector.

(1) When the co-sharers of a mahal agree to have such mahal partitions by an arbitrator, they must be understood to agree to the arrangements made by such arbitrator, and if he provides by his award that the sir land of one co-sharer that falls by lot into the share of another co-sharer should be surrendered, that land must be given up by the co-sharer who has hitherto cultivated it. Such co-sharer's consent to such arrangements must be understood to have been given when he agreed to arbitration. Section 125 of Act XIX of 1873 must not be regarded as empowering a co-sharer who has once given his consent to surrender the cultivation, to continue to cultivate the land against the will of the co-sharer, who has become the owner of it by partition.

An agreement to refer to arbitration, the partition of a mahal provided that if sir land belonging to one co-sharer were assigned to another co-sharer, the co-sharer to whom the same belonged should surrender it to the co-sharer, to whom it might be assigned. The arbitrator assigned certain sir land belonging to the defendants in this suit to the plaintiffs. The partition was concluded according to the terms of the award. The defendants refused to surrender such land to the plaintiffs. The plaintiffs distrained the produce of such land, alleging that it was held by certain persons as their tenants. The defendants sued the plaintiffs in the Revenue Court claiming such produce as their own. The Revenue Court held that such distress was illegal, as the land was in possession of the defendants as occupancy-tenants under section 125. The plaintiffs subsequently sued the defendants in the Civil Court for possession, basing it on the partition-proceeding. *Held*, that the decision of the Revenue Court did not debar the Civil Courts from determining the rights of the parties under the partition, and such suit was cognizable in the Civil Courts (*Abhai Pandi v. Bhagwan*, 1881, 1. L. R. 3 All. 818).

126. Tanks, wells, water-courses and embankments shall be considered as attached to the land for the benefit of which they were originally made.

Rule as to tanks, wells, water-courses and embankments.

Where, from the extent, situation or construction of such works, it is found necessary that they should continue the joint

property of the proprietors of two or more of the mahals into which the mahal may be divided, the Collector of the District or Assistant Collector shall determine the extent to which the proprietors of each mahal may make use of the said works, and the proportion of the charges for repairs of such works to be borne by such proprietors respectively, and the manner in which the profits, if any, derived from such works, shall be divided.

Rule as to places of worship and burial-grounds.

127. Places of worship and burial-grounds, held in common previous to the partition of a mahal, shall continue to be so held, unless the parties otherwise agree among themselves.

In such cases they shall state in writing the agreement into which they have entered, and such writing shall be filed with the record.

Determination of revenue payable by each division of a mahal.

128. The amount of revenue to be paid by each portion of the divided mahal shall be determined by the Collector of the District or Assistant Collector: provided that the aggregate revenue of the new mahals shall not exceed the revenue assessed on the mahal immediately before partition,

Liability of proprietors.

and the proprietors of the new mahals shall be held liable for the portions of the revenue severally assessed on their mahals, whether new engagements be taken from them or not.

Under the terms of section 128 it is obligatory on the officer in charge of a partition to redistribute and determine the amount of revenue payable by each of the newly formed mahals, subject to the proviso at the end of the section (*Pandit Jawahir Lal and others v. Rachpal Singh and another*, B. S. D. 1885-87, p. 47).

Power to make rules as to costs.

129. The Board shall make rules for determining the costs of partitions under this Act, and the mode in which such costs are to be apportioned:

Cost of survey.

Provided that the cost of surveying a mahal, when such survey is necessary for the purpose of partition, shall be paid rateably by all the co-sharers of the mahal, according to their shares therein.

Case may be struck off for default as to costs.

The Revenue Courts should explain the partition-proceedings and show all the papers to the parties, and obtain their signature (*Akbar Khan v. Kishen Sahai*, No. 227 of 1879).

130. If the costs to be paid by the applicant for partition are not paid within a time to be fixed by the Collector of the District or Assistant Collector, the case may be struck off the file.

And if at any stage of the proceedings there appears to be any reason for stopping the partition, the Collector of the District may of his own motion, or on the report of the Assistant Collector making the partition, stay the partition and order the proceedings to be quashed.

Power to stay partition.

A partition case cannot be struck off the file by a Revenue Court, because the applicant for partition, though prepared to pay his rateable share of the costs, objects to pay the costs payable by the other parties to the partition. Such costs should be realized in accordance with the procedure laid down in the Act from the persons by whom they are payable (*Makhan Lal v. Akbar Husain and others*, Legal Remembrancer p. 54, Vol. II). Nor it can be struck off on the ground that the mahals after partition will be too small (*Raghinath Bhand v. Jumman Lal*, Board's File No. 412 of 1880).

131. Every partition shall either be made by the Collector of the District, or, if made by an Assistant Collector, be reported to the Collector of the District for his sanction and confirmation ;

Partitions to be made or confirmed by Collector, and notified to parties.

and on completion of a partition, the Collector of the District shall publish a notification of the fact at his office and at some conspicuous place on each of the new mahals, or in the village of which they form part ;

and it shall take effect from the first day of July next after the date of such notification.

When to take effect.

The Collector before confirming may, under his general power of control, cause any necessary amendment to be made.

132. An appeal against the decision of the Collector of the District making or confirming a partition, shall lie to the Commissioner of the Division within one year from the date on which such partition takes effect.

Appeal to Commissioner from orders of Collector.

133. Where the public revenue is fraudulently or erroneously distributed at the time of the partition, the Local Government may, within twelve years from the time of discovery of the fraud or error, order a new allotment of the public revenue upon the several mahals into which the mahal has been divided, on an estimate of the assets of each mahal at the time of the partition, to be made conformably to the best evidence and information procurable respecting the same.

Power to order new allotment of revenue on proof of fraud or error in first distribution.

The limitation is twelve years.

134. Imperfect partition shall be carried out according to the provisions of the preceding sections, so far as they are applicable :

Making of imperfect partitions.

**Consent
required.**

Provided that no application for imperfect partition shall be entertained unless the consent of all the recorded co-sharers in the property of which partition is sought be first obtained.

**Civil Courts
barred from
entertaining
applications
for partition.**

135. No Civil Court shall entertain any suit or application for perfect or imperfect partition.

A suit by a co-sharer in a joint zamindari estate for partition and possession of his proportionate share of an isolated lot of land is not maintainable in a Civil Court (*Ijrail v. Kanhai*, (1887) I.L.R., 10, All p. 5).

**Union of
mahals ori-
ginally part
of same
village.**

136. If two or more revenue-paying mahals have originally formed portion of the same village, the proprietors shall be entitled to have such mahals united and to hold them as a single mahal.

**Application
for such
union.**

137. Every application for the union of such mahals shall be made in writing to the Collector of the District or Assistant Collector in charge of the sub-division of the district in which the mahals are situate.

**How to be
dealt with.**

138. If the Collector of the District or Assistant Collector, as the case may be, see no objection, he shall comply with the application, and cause the necessary entries to be made in the records of his office, reporting the case to the Commissioner of the Division.

**Application of
Chapter to
partition of
union of re-
venue-free
mahals.**

139. The provisions of this Chapter, so far as they are applicable, may be applied by the order of the Collector of the District to the partition or union of mahals held free of revenue.

• Partition Law for Oudh •

ACT XVII OF 1876

**PASSED BY THE GOVERNOR GENERAL OF INDIA IN
COUNCIL.**

CHAPTER V.

PARTITION AND UNION OF MAHALS.

68. Partition is either perfect or imperfect.

Partitions.

‘Perfect partition’ means the division of a mahal into two or more mahals, severally responsible for the revenue assessed on each. ‘Perfect partition.’

‘Imperfect partition’ means the division of any mahal, or of any portion of a mahal, into two or more portions jointly responsible for the revenue assessed on the whole mahal. ‘Imperfect partition.’

69. Any recorded co-sharer in a mahal, and any person in whose favour a decree has been passed by any Civil Court, awarding to him the proprietary right in a portion of a mahal, whether such portion consists of a fractional share in the whole or a part of the mahal, or of specific lands, is entitled to claim perfect partition of his share. Persons entitled to perfect partition.

Any two or more recorded co-sharers may claim that their shares be divided from the other shares by a perfect partition, and be held by them as a single mahal.

If any recorded co-sharer be under disability, the person in possession of his property shall, for the purpose of this section, be deemed to be a recorded co-sharer.

70. Applications for perfect partition are to be made in writing to the Deputy Commissioner of the district in which the mahal is situated; Application for perfect partition.

and shall be accompanied by a certified copy of the record, showing the share held by the applicant in the mahal:

Provided that, if the mahal be situated in two or more districts, the application may be made in any one of those districts, and the partition shall be made by such one of the Deputy Commissioners of those districts as the Chief Commissioner may direct. Provision as to estates situated in more than one district.

Notification
of applica-
tion.

71. The Deputy Commissioner, on receiving an application for partition, shall, if the application be in order and not open to objection on the face of it, publish a notification of the same at his office, and at some conspicuous place in the mahal to which the application relates,

Notice to co-
sharers not
joining.

and shall serve a notice on all such of the recorded co-sharers in the mahal as have not joined in the application, requiring any co-sharer in possession who may object to the partition to appear before him to state his objection, either in person or by a duly authorized agent, on a day to be specified in the notice, not less than thirty, or more than sixty, days from the date on which such notice was issued.

Notification
when alone
sufficient.

72. Where, from any cause, notice cannot be personally served on any co-sharer, the notification so published shall be deemed sufficient notice.

Power to re-
fuse partition
when objec-
tion admit-
ted.

73. If, on or before the day so specified, any objection is made to the partition by any co-sharer in possession, and the Deputy Commissioner, on a consideration of such objection, is of opinion that there is any good and sufficient reason why the partition should be absolutely disallowed, he may refuse the application, recording the grounds of his refusal.

Procedure if
question of
title be
raised.

74. If the objection raises any question of title, or of proprietary right, which has not been already determined by a Court of competent jurisdiction, the Deputy Commissioner may either decline to grant the application until the question in dispute has been determined by a competent Court, or he may proceed to enquire into the merits of the objection.

In the latter case the Deputy Commissioner, after making the necessary inquiry and taking such evidence as may be adduced, shall record a proceeding declaring the nature and extent of the interests of the party or parties applying for the partition, and any other party or parties who may be affected thereby.

Procedure in
such cases.

The procedure to be observed by the Deputy Commissioner in trying such cases shall be that laid down in the Code of Civil Procedure for the trial of original suits, and he may, with the consent of the parties, refer any question arising in such case to arbitration, and the provisions of chapter VI (relative to arbitrators) of the same Code shall apply to such references.

Reference to
arbitration.

75. All orders and decisions passed by the Deputy Commissioner under the last preceding section, for declaring the rights of parties, shall be held to be decisions of a Court of civil judicature of first instance, and shall be open to appeal under the provisions of the Oudh Civil Courts Act XXXII of 1871. Deputy Commissioner's decision equivalent to decision of Civil Court. Appeal thereupon.

Upon such appeal being made, the appellate Court may issue a precept to the Deputy Commissioner, desiring him to stay the partition pending the decision of the appeal. Appellate Court may stay partition.

76. When it has been decided to make a partition under this chapter, the Deputy Commissioner shall either give the parties the option of making the partition themselves, or of appointing arbitrators for the purpose; or he shall make the partition himself or cause it to be made by any Assistant Commissioner subordinate to him, and when made by an Assistant Commissioner, it shall be reported to the Deputy Commissioner for his confirmation. Option to make partition themselves or to appoint arbitrators.

77. If arbitrators are appointed, the provisions of sections one hundred and ninety-one to two hundred and two, both inclusive, shall apply. Partition by arbitrators.

These sections are as follow :—

191. The Chief Commissioner, a Commissioner of a Division, a Deputy Commissioner, an Assistant Commissioner of the first class, an officer in charge of a settlement, or an Assistant Settlement Officer may, with the consent of the parties, by order, refer any dispute before him to arbitration; and any officer acting under the provisions of sections one hundred and two to one hundred and seven, both inclusive, may, with the consent of the parties, refer to arbitration any dispute arising before him respecting the matters mentioned in the same sections.

192. In referring any such dispute to arbitration, the officer making the reference shall specify, in the order of reference, the precise matter submitted to the arbitrators, and such period as he may think reasonable for the delivery of the award;

and he may from time to time extend such period.

193. The parties to the case may each nominate either one or two arbitrators, provided that each party shall nominate the same number;

and a third or fifth arbitrator (as the case may be) shall be appointed by the parties, or, in the event of their being unable to agree, by the officer making the reference.

194. Every officer making a reference under this chapter may, on good cause shown, excuse any person from serving as an arbitrator, and may call on the party who nominated such person to nominate another in the place of the person so excused.

195. If an arbitrator die, desire to be discharged, or refuse or become incapable to act, the party who nominated him shall nominate another person in his place.

196. If in any of the cases provided for by section one hundred and ninety-four or section one hundred and ninety-five, any party fail for a week to nominate in manner aforesaid, the officer making the reference shall appoint some person to act as arbitrator.

The arbitrators shall determine and award concerning the matters referred to them for arbitration; and the parties disputing, and all persons claiming through them respectively, shall abide by and perform the award of the arbitrators.

197. If the arbitrators require the presence of the parties, or any other persons whose evidence may be necessary, they shall apply to the officer making the reference, who shall summon such parties or persons;

and all such parties or persons shall be bound to attend, either in person or by agent, as the arbitrators may require, and to state the truth as to the subject-matter of the reference, and to produce such documents and other things as may be required before the arbitrators.

198. The award shall be made in writing under the hands of the arbitrators, and shall be submitted by them to the officer making the reference, who shall cause notice to be served on the parties to attend and hear the award.

199. The officer making the reference may remit the award or any of the matters referred to arbitration to the re-consideration of the same arbitrators,

(a) if the award has left undetermined some of the matters referred to arbitration, or if it determine matters not referred to arbitration;

(b) if the award is so indefinite as to be incapable of execution;

(c) if an objection to the legality of the award is apparent upon the face of the award.

200. No award shall be liable to be set aside except on the ground of corruption or misconduct of all or any of the arbitrators.

Any application to set aside an award shall be made within ten days after the day appointed for hearing the award.

201. If the officer making the reference does not see cause to remit the award or any of the matters referred to arbitration for re-consideration in the manner aforesaid,

and if no application has been made to set aside the award, or if he has refused such application,

he shall decide in accordance with the award of the majority of the arbitrators,

and shall fix the amount to be allowed for the expenses of the arbitration, and direct by and to whom, and in what manner, the same shall be paid.

202. Such decision shall not be open to appeal, and shall be at once carried out ;

and no Civil Court shall entertain any suit for the purpose of setting it aside or against the arbitrators on account of their award.

In making a partition, arbitrators shall not be bound by the provisions of sections eighty to eighty-three, both inclusive ; but they shall deliver a full and complete paper of partition, specifying the separate mahals into which they propose that the mahal shall be divided ; the names of the parties to whom the several mahals are proposed to be allotted, and the amount of land-revenue which in the opinion of the arbitrators should be assessed on each of such mahals.

78. In making partitions, the Deputy Commissioner, and any person appointed by him, shall have the same powers to enter on the land under partition, for marking out the boundaries, surveying the mahal, and other purposes, as are conferred on Settlement Officers under this Act.

Power to enter on land for purposes of partition.

79. When a Deputy Commissioner has decided that a partition shall be made, he may, with the sanction of the Commissioner, hold the mahal under direct management pending the completion of the partition.

Power to hold mahal under direct management pending partition.

The provisions of the law in force for the time being for the management of mahals held under direct management under section one hundred and nineteen for arrears of revenue, shall be applicable to mahals the management of which is assumed under this section.

The collections of the mahal shall be applied to the payment of the Government revenue, and, after defraying the expenses of management and any other expenses with which the mahal is chargeable, the residue shall be divided amongst the recorded co-sharers, in proportion to their respective shares, at such periods as the Deputy Commissioner may see fit.

Partition of
lands held
only in
severalty.

80. Where there are no lands held in common, the lands held in severalty by the applicant for partition shall be declared a separate mahal, and shall be separately assessed to the Government revenue.

Partition of
lands some
of which are
held in
common.

81. Where some of the lands are held in common, the Deputy Commissioner shall allot to the applicant for partition his share of such lands in accordance with village-custom, if any such exist.

If no such custom exist, the Deputy Commissioner shall make such division as may secure to the applicant his fair portion of the common lands.

Formation of
separate
mahals from
shares allotted
in partition.

82. The portion of the common lands falling by such partition to the share of the applicant shall be added to the land held by him in severalty, and the mahals thus formed shall be assessed and declared separate mahals.

Transfers to
be effectuated
in making
partition.

83. In making partitions under this Act, the Deputy Commissioner shall give effect to any transfer of lands held in severalty and forming part of the mahal, which has been agreed to by the parties previous to the declaration of the partition.

Partition
where all
lands are
held in com-
mon.

84. Where all the lands are held in common, the Deputy Commissioner shall make such a partition as may secure to the applicant his fair share of the mahal.

Estate to be
compact.

85. In all cases each mahal shall be made as compact as possible: Provided that, except with the sanction of the Chief Commissioner, no partition be disallowed solely on the ground of incompactness.

Rule when
dwelling-
house of one
sharer is
included in
mahal
assigned to
another.

86. If in making the partition it be necessary to include in the mahal assigned to one sharer, the land occupied by a dwelling-house or other building in the possession of another co-sharer, such other co-sharer shall be allowed to retain it, with the buildings thereon (if any), on condition of his paying a reasonable ground-rent therefor to the sharer into whose portion it may fall.

The limits of such land, and the rent to be paid for it, shall be fixed by the Deputy Commissioner.

Rule as to
tanks, wells,
water-courses
and embank-
ments.

87. Tanks, wells, water-courses and embankments shall be considered as attached to the land for the benefit of which they were originally made.

Where, from the extent, situation or construction of such works, it is found necessary that they should continue the joint property of the proprietors of two or more of the mahals into which the mahal may be divided, the Deputy Commissioner shall determine the extent to which the proprietors of each mahal may make use of the said works, and the proportion of the charges for repairs of such works to be borne by such proprietors respectively, and the manner in which the profits, if any, derived from such works, shall be divided.

88. Places of worship and burial-grounds, held in common previous to the partition of a mahal, shall continue to be so held, unless the persons who so held them otherwise agree among themselves.

Rules as to
places of
worship and
burial-
grounds.

In such cases they shall state in writing the agreement into which they have entered, and such writing shall be filed with the record.

89. In all cases, whether partition has been made by arbitrators or otherwise, the amount of revenue to be paid in respect of each portion of a mahal partitioned under this chapter shall be determined by the Deputy Commissioner, provided that the aggregate revenue payable in respect of the new mahals shall not exceed the revenue assessed on the mahal immediately before partition ;

Determina-
tion of
revenue
payable by
each division
of a mahal.

and the proprietor of each new mahal shall be held liable for the portion of the revenue assessed on his mahal, whether a new engagement be taken from him or not.

Liability of
proprietors.

90. If at any stage of any proceedings under this chapter there appears to be any reason for stopping the partition, the Deputy Commissioner may of his own motion, or on the report of the Assistant Commissioner making the partition, stay the partition and order the proceedings to be quashed.

Power to stay
partition.

91. A partition, whether made by the Deputy Commissioner himself or otherwise, shall not be deemed to be complete unless the Deputy Commissioner has made an order confirming it.

Order con-
firming
partition.

On making such order, he shall publish a notification of the fact at his office and at some conspicuous place in each of the new mahals,

Notification
of order.

Partition when to take effect.

and the partition shall take effect on and from the first day of July next after the date of such notification.

Appeal to Commissioner from orders of Deputy Commissioner.

92. An appeal against the decision of the Deputy Commissioner confirming a partition, shall lie to the Commissioner of the division within one year from the date on which such partition takes effect.

Power to order new allotment of revenue on proof of fraud or error in first distribution.

93. Where the land-revenue is fraudulently or erroneously distributed at the time of the partition, the Chief Commissioner may, within twelve years from the time of discovery of the fraud or error, order a new allotment of the land-revenue upon the several mahals into which the mahal has been divided, on an estimate of the assets of each mahal at the time of the partition, to be made conformably to the best evidence and information procurable respecting the same.

Making of imperfect partitions.

94. Imperfect partition shall be carried out according to the provisions of sections sixty-nine to ninety-two (both inclusive) so far as they are applicable: Provided that no application for imperfect partition shall be entertained unless the consent of recorded co-sharers holding in the aggregate more than one moiety of the property of which partition is sought be first obtained.

Civil Courts barred from entertaining applications for partitions.

95. No Civil Court shall entertain any suit or application for perfect or imperfect partition.

Previous imperfect partitions and partitions of under-proprietary mahals.

96. All imperfect partitions and all partitions perfect or imperfect of under-proprietary mahals hitherto made, shall be deemed to have been made under the provisions of this Act.

Union of mahals originally part of same village.

97. If two or more revenue-paying mahals have originally formed portions of the same village, the proprietor shall be entitled to have such mahals united and to hold them as a single mahal.

Application for such union.

98. Every application for the union of such mahals shall be made in writing to the Deputy Commissioner of the district in which the mahals are situate.

Application how dealt with.

If the Deputy Commissioner see no objection, he shall comply with the application, and cause the necessary entries to

be made in the register of his office, reporting the case to the Commissioner of the division.

99. The provisions of this chapter, so far as they are applicable, may be applied by order of the Deputy Commissioner to the partition or union of mahals held free of revenue.

Partition or union of revenue-free mahals.

100. The partition of taluqdari and under-proprietary mahals and of mahals held by lessees whose rent has been fixed by the Settlement Officer or other competent authority, shall be carried out according to the provisions of sections sixty-nine to ninety-three (both inclusive), so far as they are applicable.

Partition of taluqdari and under-proprietary mahals.

(a) In the partition of taluqdari mahals, all mahals, whether under-proprietary or held by lessees whose rent has been fixed by the Settlement Officer or other competent authority, shall, if practicable, be assigned to one or other of the new taluqas to be formed by the partition;

Assignment of inferior mahals.

(b) if any such mahal cannot be assigned in whole, the assignment shall be made by thoks, pattis or other existent sub-divisions;

(c) and if no other satisfactory arrangement can be made, such mahal shall be partitioned;

(d) in cases in which one portion of any such mahal is assigned to one taluqa and another portion to another taluqa, each portion shall be deemed a separate mahal, the joint responsibility of the co-sharers being limited to such portion.

101. Whenever a partition of a mahal, whether under-proprietary or held by lessees whose rent has been fixed as aforesaid, is effected under this Act, the amount of rent to be paid in respect of each portion shall be determined by the Deputy Commissioner, and the person to whom such rent is payable may present an application in writing to the Deputy Commissioner objecting to the distribution of the rental over the several parts into which the mahal has been divided, and praying that such objection may be heard and determined; and his objection shall be heard and determined, and the Deputy Commissioner shall record his reasons for such determination.

Objection to distribution of rental.

The Law of Partition in the Punjab

ACT XVII OF 1887

PASSED BY THE GOVERNOR GENERAL OF INDIA IN
COUNCIL.

CHAPTER IX.

PARTITION.

Effect of par-
titions of es-
tates and
tenancies on
joint liability
for revenue
and rents.

110. A partition of land, either under this chapter or otherwise, shall not, without the express consent of the Financial Commissioner, affect the joint liability of the land or of the landowners thereof for the revenue payable in respect of the land, or operate to create a new estate, and, if any conditions are attached to that consent, those conditions shall be binding on the parties to the partition.

(2) A partition of a tenancy shall not, without the express consent of the landlord affect the joint liability of the co-sharers therein for the payment of the rent thereof.

Application
for partition.

111. Any joint owner of land, or any joint tenant of a tenancy in which a right of occupancy subsists, may apply to a revenue-officer for partition of his share in the land or tenancy, as the case may be, if—

(a) at the date of the application the share is recorded under chapter IV as belonging to him, or

(b) his right to the share has been established by a decree which is still subsisting at that date, or

(c) a written acknowledgment of that right has been executed by all persons interested in the admission or denial thereof.

Restriction
and limita-
tions on par-
tition.

112. Notwithstanding anything in the last foregoing section—

(1) places of worship and burial-grounds held in common before partition shall continue to be so held after partition, unless the parties otherwise agree among themselves and record their agreement and file it with the revenue officer;

- (2) Partition of any of the following properties, namely :—
- (a) any embankment, water-course, well, or tank, and any land on which the supply of water to any such work may depend,
 - (b) any grazing ground, and
 - (c) any land which is occupied as the site of a town or village and is assessed to land revenue, may be refused if, in the opinion of the revenue-officer the partition of such property is likely to cause inconvenience to the co-sharers or other persons directly or indirectly interested therein or to diminish the utility thereof to those persons ;
 - (3) the fact that a partition on the application of a joint owner of land would render necessary the severance into two or more parts of the land comprised in the tenancy of a tenant having a right of occupancy may, unless the tenant assents to the severance, be a sufficient reason for the disallowance of the partition in so far as it would affect that tenancy; and
 - (4) the fact that the landlord objects to the partition of a tenancy may be sufficient reason for the absolute disallowance of the partition thereof.

113. The revenue-officer, on receiving the application under section 111, shall, if it is in order and not open to objection on the face of it, fix a day for the hearing thereof, and—

Notice of application for partition.

- (a) cause notice of the application and of the day so fixed to be served on such of the recorded co-sharers as have not joined in the application, and, if the share of which partition is applied for is a share in a tenancy, on the landlord also; and
- (b) if he thinks fit, cause the notice to be served on, or proclaimed for the information of, any other persons whom he may deem to be directly or indirectly interested in the application.

Addition of parties to application

114. On the day fixed for the hearing, or on any day to which the hearing may be adjourned, the revenue-officer shall ascertain whether any of the other co-sharers desire the partition of their shares also, and if any of them so desire, he shall add them as applicants for partition.

Absolute disallowance of partition.

115. After examining such of the co-sharers and other persons as may be present on that day, the revenue-officer may, if he is of opinion that there is good and sufficient cause why partition should be absolutely disallowed, refuse the application, recording the grounds of his refusal.

Procedure on admission of application.

116. If the revenue-officer does not refuse the application under the last foregoing section, he shall ascertain the questions, if any, in dispute between any of the persons interested, distinguishing between—

- (a) questions as to title in the property of which partition is sought; and
- (b) questions as to the property to be divided, or the mode of making the partition.

Disposal of questions as to title in property to be divided.

117. (1) When there is a question as to title in any of the property of which partition is sought, the revenue-officer may decline to grant the application for partition until the question has been determined by a competent Court, or he may himself proceed to determine the question as though he were such a Court.

(2) Where the revenue-officer himself proceeds to determine the question, the following rules shall apply namely:—

- (a) If the question is one over which a Revenue Court has jurisdiction, the revenue-officer shall proceed as a Revenue Court under the provisions of the Punjab Tenancy Act, 1887.
- (b) If the question is one over which a Civil Court has jurisdiction, the procedure of the revenue-officer shall be that applicable to the trial of an original suit by a Civil Court, and he shall record a judgment and decree containing the particulars required by the Code of Civil Procedure to be specified therein.
- (c) An appeal shall lie from the decree of the revenue-officer under clause (b) as though that decree

were a decree of a district judge in an original suit.

(d) Upon such an appeal being made, the Divisional Court or Chief Court, as the case may be, may issue an injunction to the revenue-officer requiring him to stay proceedings pending the disposal of the appeal.

(e) From the appellate decree of a Divisional Court upon such an appeal a further appeal shall lie to the Chief Court, if such a further appeal is allowed by the law for the time being in force.

118. (1) When there is a question as to the property to be divided, or the mode of making a partition, the revenue-officer shall, after such inquiry as he deems necessary, record an order stating his decision on the question and his reasons for the decision.

Disposal of other questions.

(2) An appeal may be preferred to the Commissioner from an order under sub-section (1) within fifteen days from the date thereof, and, when such an appeal is preferred and the institution thereof has been certified to the revenue-officer by the Commissioner, the revenue-officer shall stay proceedings, pending the disposal of the appeal.

(3) If an applicant for partition is dissatisfied with an original or appellate order under this section, and applies for permission to withdraw from the proceedings in so far as they relate to the partition of his share, he shall be permitted to withdraw therefrom on such terms as the revenue-officer thinks fit.

(4) When an applicant withdraws under the last foregoing sub-section, the revenue-officer may where the other applicants, if any, desire the continuance of the proceedings continue them in so far as they relate to the partition of the shares of those other applicants.

119. When any such property as is referred to in section 112, clause (2), is excluded from partition, the revenue-officer may determine the extent and manner to and in which the co-sharers and other persons interested therein may make use thereof, and the proportion in which expenditure incurred

Administration of property excluded from partition.

thereon and profits derived therefrom respectively, are to be borne by and divided among those persons or any of them.

Distribution
of revenue
and rent
after parti-
tion.

120. (1) The amount of revenue to be paid in respect of each of the holdings into which land has been divided on a partition, and the amount of rent to be paid in respect of each of the portions into which a tenancy has been so divided shall be determined by the revenue-officer making the partition.

(2) The determination of the revenue-officer as to the revenue to be paid in respect of each holding shall, where the estate in which the holding is situate is subject to a fixed assessment, be deemed to be an order under section 56, sub-section (1).

(3) Where new estates have been created at a partition and the land-revenue has been fraudulently or erroneously distributed among them, the Local Government may, within twelve years from the time of discovery of the fraud or error, order a new distribution of the land-revenue among the several estates on an estimate of the assets of each estate at the time of the partition, to be made conformably to the best evidence and information procurable respecting the same.

Instrument
of partition.

121. When a partition is completed, the revenue-officer shall cause an instrument of partition to be prepared, and the date on which the partition is to take effect to be recorded therein.

Delivery of
possession of
property al-
lotted on
partition.

122. An owner or tenant to whom any land or portion of a tenancy, as the case may be, is allotted in proceedings for partition shall be entitled to possession thereof as against the other parties to the proceedings and their legal representatives, and a revenue-officer shall, on application made to him for the purpose by any such owner or tenant at any time within three years from the date recorded in the instrument of partition under the last foregoing section, give effect to that instrument so far as it concerns the applicant as if it were a decree for immovable property.

Affirmation
of partitions
privately
effected.

123. (1) In any case in which a partition has been made without the intervention of a revenue officer, any party thereto may apply to a revenue-officer for an order affirming the partition.

(2) On receiving the application, the revenue-officer shall enquire into the case, and, if he finds that the partition has in fact been made, he may make an order affirming it and proceed under sections 119, 120, 121, and 122, or any of those sections, as circumstances may require, in the same manner as if the partition had been made on an application to himself under this chapter.

124. The Financial Commissioner may make rules for determining the costs of partitions under this chapter and the mode in which such costs are to be apportioned. Power to make rules as to costs of partitions.

125. When by established custom any land in an estate is subject to periodical re-distribution, a revenue-officer may, on the application of any of the landowners, enforce the re-distribution according to the custom, and for this purpose may exercise all or any of the powers of a revenue-officer in proceedings for partition. Re-distribution of land according to custom.

126. The revenue-officer by whom proceedings may be taken under this chapter shall be a revenue-officer of a class not below that of Assistant Collector of the first grade. Officers who may be empowered to act under this chapter.

The Law of Partition in the Central Provinces

ACT XVI OF 1889'

PASSED BY THE GOVERNOR GENERAL OF INDIA IN
COUNCIL

CHAPTER XA.

PARTITION.

Perfect and Imperfect Partition.

**Perfect and
imperfect
partition.**

136. (1) Partition is either perfect or imperfect.

(2) Perfect partition means the division of a mahal into two or more mahals.

(3) Imperfect partition means the division of a mahal into two or more pattis jointly responsible for the revenue assessed on the whole mahal.

**Persons
entitled to
imperfect
partition.**

136A. Any recorded co-sharer of a mahal and any person in whose favour a decree has been passed awarding to him a proprietary interest in a mahal, whether such interest consists of a fractional share in the whole mahal or a part of the mahal or of specific lands, is entitled to claim at any time imperfect partition of his share.

**Persons
entitled to
perfect parti-
tion.**

136B. Any recorded co-sharer in a mahal not being a mahal

(a) in the Sambalpur district, or

(b) held by superior and inferior proprietors and which the Chief Commissioner by rule declares to be incapable of perfect partition,

whose share, saving such part of it as may be impartible, has been completely separated from the rest of the mahal and is held by him in severalty, is entitled to claim perfect partition of his share at the time of settlement of such mahal.

136C. No Civil Court shall entertain any suit or application for the imperfect or perfect partition of a mahal.

Jurisdiction of Civil Court barred as to partition.

Imperfect Partition.

136D. (1) Applications for imperfect partition shall be made in writing to the Deputy Commissioner of the district in which the mahal is situate.

Applications for imperfect partition to be made to Deputy Commissioner.

(2) If the mahal is situate in two or more districts, the application may be made in any one of those districts, and the partition shall be made by such one of the Deputy Commissioners of those districts as the Chief Commissioner may direct.

136E. (1) The Deputy Commissioner on receiving an application for imperfect partition shall, if the application be in order, and not open to objection on the face of it, publish a notification of the same at his office and at some conspicuous place on the mahal to which the application relates, and shall serve a notice on all such of the recorded co-sharers in the mahal as have not joined in the application, requiring any co-sharer in possession who may object to the partition to appear before him to state his objection either in person or by a duly authorized agent on a day to be specified in the notice, not being less than thirty or more than sixty days from the date on which such notice was issued.

Procedure or receipt of application.

(2) Where from any cause notice cannot be personally served on any co-sharer, the notification shall be deemed sufficient notice under this section.

136F. If on or before the day specified any objection is made to the partition by any co-sharer in possession, and the Deputy Commissioner on a consideration of such objection is of opinion that there is good and sufficient reason why the partition should be absolutely disallowed, he may refuse the application, recording the grounds of his refusal.

Objection to partition.

136G. (1) If the objection raises any question of title or of proprietary right which has not been already determined by a Court of competent jurisdiction, the Deputy Commissioner may either decline to grant the application until the question in dispute has been determined by a competent Court or may proceed to inquire into the merits of the objection.

Objection raising question of title.

(2) In the latter case the Deputy Commissioner, after making the necessary inquiry and taking such evidence as may be adduced, shall record a judgment declaring the nature and extent of the interests of the party or parties applying for the partition, and of any other party or parties who may be affected thereby.

(3) The procedure to be observed by the Deputy Commissioner in trying such cases shall be that laid down in the XIV of 1882. Code of Civil Procedure for the trial of original suits, and he may with the consent of the parties refer any question arising in such case to arbitration, and the provisions of Chapter XXXVII of the same Code relative to arbitration shall apply to such references.

Effect of Deputy Commissioner's orders in such cases and appeals therefrom.

XVI of 1885.

136H. (1) All decrees and orders passed by the Deputy Commissioner under the last foregoing section deciding the rights of parties shall be held to be decrees and orders of a Court of Civil Judicature, and shall be open to appeal as if passed by the Court of the Deputy Commissioner acting as a Court of Civil Judicature of first instance under the Central Provinces Civil Courts Act, 1885.

(2) Upon such appeal being made the Court of appeal may issue a precept to the Deputy Commissioner directing him to stay the partition pending the decision of the appeal.

Second appeal in such cases.

136I. From any decree or order passed under the last foregoing section by a Commissioner sitting as a Court of appeal a second appeal shall, where a second appeal is by law allowed, lie to the Court of the Judicial Commissioner under the law for the time being in force relating to second appeals to that Court.

Option to parties to make partition themselves or appoint arbitrators.

136J. Where it has been decided to make a partition under this Chapter the Deputy Commissioner may give the parties the option of making the partition themselves or appointing arbitrators for the purpose; or he shall make the partition himself.

Proceeding to be recorded by the Deputy Commissioner before making partition.

136K. Before commencing to make the partition the Deputy Commissioner shall record a proceeding specifying the lands held in severalty, if any, and the land held in common, and laying down the principles to be followed in making the partition, with particulars of the method on which such principles are to be applied.

136L. (1) The patti of each sharer shall be made as compact as possible: Each patti to be made as compact as possible.

Provided that, so far as may be compatible with fairness of partition, lands held in severalty shall be left in the possession of the parties holding the same.

(2) No partition shall be disallowed solely on the ground of incompactness.

136M. (1) If in making the partition it be necessary to include in any patti the land occupied by a dwelling-house or other building in the possession of another co-sharer, such other co-sharer shall be allowed to retain it, with any buildings thereon, on condition of his paying a reasonable ground-rent for it to the sharer into whose patti it may fall. Rule when house of one sharer is included in the patti of another.

(2) The limits of such land and the rent to be paid for it shall be fixed by the Deputy Commissioner.

136N. (1) No sir-land belonging to any co-sharer shall be included in the patti assigned on partition to another co-sharer unless with the consent of the co-sharer who cultivates it, or unless the partition cannot otherwise be conveniently carried out. Sir-land belonging to one sharer not to be included without his consent in the patti of another sharer.

(2) If such land be so included and after partition such co-sharer continue to cultivate it, he shall be recorded as an occupancy-tenant in respect of such land and his rent shall be fixed by order of the Deputy Commissioner.

136O. (1) Tanks, wells, water-courses and, embankments shall be treated as attached to the land for the benefit of which they were originally made. Rule as to tanks, wells and other irrigation-works.

(2) Where, from the extent, situation or construction of such works, it is found necessary that they should continue the joint property of the proprietors of two or more of the pattis into which the mahal may be divided, the Deputy Commissioner shall determine the extent to which the proprietors of each patti may make use of the said works, and the proportion of the charges for repairs of such works to be borne by such proprietors respectively, and the manner in which the profits, if any, derived from such works shall be divided.

136P. (1) Places of worship and burial-grounds held in common previous to the partition of a mahal shall continue to be so held unless the parties otherwise agree among themselves. Rule regarding places of worship and burial-grounds.

(2) In such cases they shall state in writing the agreement into which they have entered, and such writing shall be filed with the record.

Deputy Commissioner may dismiss case for non-payment of costs or may quash proceedings.

136Q. (1) If the costs to be paid by the applicant for partition are not paid within a time to be fixed by the Deputy Commissioner, the case may be dismissed.

(2) If at any stage of the proceedings, there appears to be any reason for stopping the partition, the Deputy Commissioner may stay the partition and order the proceedings to be quashed, recording his reasons for so doing.

Commissioner's sanction to partition necessary.

136R. On completion of the partition the Deputy Commissioner shall submit the proceedings to the Commissioner, who may either uphold the partition proposed or modify it or quash the proceedings; and a partition shall not take effect until it has been sanctioned by him.

When partition sanctioned, notification to be published.

136S. (1) On a partition being sanctioned by the Commissioner, the Deputy Commissioner shall publish a notification of the fact at his office and at some conspicuous place in the village or villages of the mahal of which the partitioned pottis formed part.

(2) The partition shall take effect from the first day of the agricultural year next after the date of such notification.

Perfect Partition.

Applications for perfect partition to be made to Settlement-officer.

136T. (1) Applications for perfect partition shall be made, in such form as may be prescribed by the Chief Commissioner, to the Settlement-officer charged with the settlement of the area in which the mahal is situate.

(2) Such applications must show that the share which it is desired to have formed into a separate mahal is already held in severalty saving such portion of it as may be impartible. An application failing to show this shall be rejected.

Settlement-officer may declare shares in mahals to be separate mahals.

136U. (1) Subject to any rules which may be made by the Chief Commissioner, the Settlement officer, if he is satisfied of the truth of the matters stated in the application, may, if he thinks fit, declare the share to be a separate mahal and may assess it separately to land-revenue :

Provided that no share shall be declared to be a separate mahal till the proprietors of other shares in the mahal have been given an opportunity of objecting to its perfect partition.

(2) Except with the sanction of the Commissioner an incompact estate shall not be declared to be a separate mahal.

• • • *Supplemental Provisions.*

136V. The Chief Commissioner may make rules Power to
make rules
regarding
partition pro-
ceedings.
regarding—

(a) the form in which applications for partition shall be made;

(b) the procedure to be followed in referring matters to arbitrators and in giving effect to the award of arbitrators;

(c) the costs of partition and the mode in which costs are to be apportioned; and,

d generally, for carrying out the provisions of this Chapter.

136W. Act XIX of 1863 (*an Act to consolidate and amend the Law relating to the partition of Estates paying revenue to Government in the North-Western Provinces of the Presidency of Fort William in Bengal*) is hereby repealed with effect from the commencement of the Central Provinces Land-Revenue Act, 1889. Repeal of
Act XIX of
1863.

The Law of Partition in Assam

REGULATION I OF 1886

PASSED BY THE GOVERNOR GENERAL OF INDIA.

CHAPTER VI.

PARTITION AND UNION OF REVENUE-PAYING ESTATES.

"Perfect partition" and "imperfect partition" defined.

Persons entitled to partition.

96. Partition is either perfect or imperfect. "Perfect partition" means the division of a revenue-paying estate into two or more such estates, each separately liable for the revenue assessed thereon. "Imperfect partition" means the division of a revenue-paying estate into two or more portions jointly liable for the revenue assessed on the entire estate.

97. (1) Every recorded proprietor of a permanently-settled estate, and every recorded landholder of a temporarily-settled estate, may, if he is in actual possession of the interest in respect of which he desires partition, claim perfect or imperfect partition of the estate:

Provided that —

- (a) no person shall be entitled to apply for perfect partition if the result of such partition would be to form a separate estate, liable for an annual amount of revenue less than five rupees;
- (b) no person shall be entitled to apply for imperfect partition of an estate unless with the consent of recorded co-sharers holding in the aggregate more than one-half of the estate;
- (c) a person may claim partition only in so far as the partition can be effected in accordance with the provisions of this chapter.

(2) When two or more proprietors or landholders would be entitled under sub-section (1) to partition in respect of their respective interests in the estate, they may jointly claim partition in respect of the aggregate of their interests.

98.. Every application for perfect partition shall be in writing, shall be presented to the Deputy Commissioner, and shall specify the area of the estate, the applicant's interest therein and the names of the other proprietors or landholders.

Application
for perfect
partition.

99. (1) The Deputy Commissioner shall, if the application is in order and not open to objection on the face of it, publish a proclamation at his office, and at some conspicuous place on the estate to which the application relates; and shall serve a notice on all such of the recorded proprietors or landholders of the estate as have not joined in the application, requiring any of them in possession who may object to the partition to appear before him and state their objections, on a day to be specified in the proclamation and notice, not being less than thirty or more than sixty days from the date on which the proclamation is issued.

Notification
of applica-
tion.

(2) Where, from any cause, notice cannot be personally served on any proprietor or landholder, the proclamation shall be deemed sufficient notice under this section.

100. (1) If an objection preferred as required under section 99 raises any question of title which has not been already determined by a Court of competent jurisdiction, the Deputy Commissioner shall stay his proceedings for such time as, in his opinion, is sufficient to admit of a suit being instituted in the Civil Court to try the objection.

Objection on
question of
title.

(2) A Deputy Commissioner staying his proceedings under this section shall make an order requiring the objector, or, if for any reason he deems it more equitable, the applicant, to institute such a suit within the time fixed, and, in the event of such a suit not being instituted within that time, may, in his discretion, disallow the objection, or dismiss the application, as the case may be.

(3) On a suit being instituted to try any objection under this section, the Deputy Commissioner shall, with reference to the objection, be guided by the orders passed by the Civil Court in the suit.

101. If any objection, other than an objection of the nature referred to in section 100, is preferred as aforesaid to the partition, the Deputy Commissioner shall dispose of it himself; unless for any reason he thinks fit to require that it be sub-

Other objec-
tions how
dealt with.

mitted to a Civil Court for adjudication, in which event the provisions of section 100 shall apply to the objection.

Proceedings
of Deputy
Commissioner after
objections
have been
disposed of.

102. When the period specified under section 99 has expired, and the objections (if any) made have been disposed of by the Deputy Commissioner or by the Civil Court, as the case may be, the Deputy Commissioner shall, if no such objection has been allowed, proceed to make the partition :

Provided that the Deputy Commissioner may, in his discretion in order to admit of the institution of an appeal from any decision regarding an objection, or for any other reason he deems sufficient, further postpone his proceedings.

Mode of
partition.

103. The Deputy Commissioner may give the parties the option of making the partition themselves, or of appointing arbitrators for the purpose; or he may make the partition himself.

Power to
enter on land
for purposes
of partition.

104. In making partitions the Deputy Commissioner, and any person appointed by him, shall have the same powers for entry on the land under partition, for making out the boundaries, surveying and other purposes, as have been conferred on Survey-officers by or under this Regulation.

Partition of
lands held
only in sever-
alty.

105. Where there are no lands held in common, the lands held in severalty by the applicant for partition shall be declared a separate estate, and shall be separately assessed to the Government revenue.

Partition of
lands some
of which are
held in com-
mon.

106. (1) Where some of the lands are held in common, the Deputy Commissioner shall allot to the applicant for partition his share of those lands in accordance with village-custom, if any such exists. If no such custom exists, the Deputy Commissioner shall make such division as may secure to the applicant his fair portion of the common lands.

(2) The portion of the common lands falling by the partition to the share of the applicant shall be added to the land held by him in severalty, and the aggregate thus formed shall be declared a separate estate, and shall be separately assessed to the Government revenue.

Partition
where all
lands held in
common.

107. Where all the lands are held in common, the Deputy Commissioner shall make such a partition as may secure to the applicant his fair share of the estate, and the land allotted to him shall be declared a separate estate, and shall be separately assessed to the Government revenue.

108. In making a partition under section 105 or section 106, the Deputy Commissioner shall give effect to any transfer of lands held in severalty, forming part of the estate, agreed to by the parties and made before the declaration of the partition.

Transfers to be effectuated in making partition.

109. In all cases each estate shall be made as compact as possible :

Estates to be compact.

Provided that, except with the sanction of the Commissioner, or where there is no Commissioner, with the sanction of the Chief Commissioner, no partition shall be disallowed solely on the ground of incompactness.

110. (1) If, in making a partition, it is necessary to include in the estate assigned to one sharer the land occupied by a dwelling house or other building in the possession of another co-sharer, that other co-sharer shall be allowed to retain it, with any buildings thereon, on condition of his paying a reasonable groundrent for it to the sharer into whose portion it may fall.

Rule when building of one sharer is included in estate assigned to another.

(2) The limits of the land, and the rent to be paid for it, shall be fixed by the Deputy Commissioner.

111. (1) Tanks, wells, water-courses and embankments shall be considered as attached to the land for the benefit of which they were originally made.

Rule as to tanks, wells, water-courses and embankments.

(2) Where, from the extent, situation or construction of any such work, it is found necessary that it should continue the joint property of the proprietors or landholders of two or more of the estates into which the estate is divided, the Deputy Commissioner shall determine the extent to which the proprietors or landholders of each estate may make use of the work, and the proportion of the charges for repairs to be borne by them respectively, and the manner in which the profits, if any, derived from the work, are to be divided.

112. (1) Places of worship and burial-grounds, held in common previous to the partition of an estate, shall continue to be so held, unless the parties otherwise agree among themselves.

Rule as to places of worship and burial-grounds.

(2) In such cases they shall state in writing the agreement into which they have entered, and their statement shall be filed with the record.

Determina-
tion of reve-
nue payable
by each por-
tion of di-
vided estate.

113. (1) The amount of revenue to be paid by each portion of the divided estate shall be determined by the Deputy Commissioner: Provided that the aggregate revenue of the new estates shall not exceed the revenue assessed on the estate immediately before partition.

(2) The proprietors or landholders of each of the new estates shall be jointly and severally liable for the portion of the revenue assessed on their estate, whether new acceptances are taken from them or not.

Costs.

114. (1) The Chief Commissioner shall make rules for determining the costs of partitions under this Act, the mode in which those costs are to be apportioned, and the parties by whom and the stage of the proceedings at which they are to be paid:—

Provided that the cost of surveying an estate, when a survey is necessary for the purpose of partition, shall be paid, rateably, by all the proprietors or landholders of the estate according to their interests therein.

(2) If the costs to be paid by the applicant for partition are not paid within a time to be fixed by the Deputy Commissioner subject to the rules made under this section, the case may be struck off the file.

Power to
stay parti-
tion.

115. If at any stage of the proceedings there appears to be any reason for stopping the partition, the Deputy Commissioner may, of his own motion, stay the partition and order the proceedings to be quashed.

• Proclamation
of partition.

116. On completion of a partition the Deputy Commissioner shall publish a proclamation of the fact at his office and at some conspicuous place on each of the new estates or in the estate of which they originally formed part;

and the partition shall take effect from the beginning of the agricultural year next after the date of the proclamation.

Appeal from
decision of
Deputy Com-
missioner.

117. An appeal against the decision of the Deputy Commissioner making a partition shall lie to the Commissioner of the Division, or, where there is no Commissioner, to the Chief Commissioner, within one year from the date on which the partition takes effect.

118. Where the revenue is fraudulently or erroneously distributed at the time of the partition, the Chief Commissioner may, within twelve years from the time of discovery of the fraud or error, order a new allotment of the revenue upon the several estates into which the estate has been divided, on an estimate of the assets of each estate at the time of the partition, to be made conformably to the best evidence and information procurable respecting the same.

Power to order new allotment of revenue on proof of fraud or error in first distribution.

119. Imperfect partition shall be carried out according to the provisions of the preceding sections, so far as they are applicable.

Making of imperfect partition.

120. If a recorded proprietor or landholder is in possession of two or more revenue-paying estates, he may, subject to the rules framed under section 121, claim to have those estates united, and to hold them as a single estate.

Persons entitled to union.

121. The Chief Commissioner may make rules, not being inconsistent with this Regulation, as to the procedure and principles to be observed in dealing with applications for, and in carrying out, the partition and union of estates, and in assessing the land-revenue on estates divided.

Power to make rules.

The Law of Partition in Madras REGULATION XXV OF 1802.

Proprietors of land may transfer proprietary right in whole or part of their zamindáris.

Restrictions under which such transfer is to be made.

Accounts to be furnished in forming part of zamindáris into separate estate.

Principle regulating assessment on part to be separated.

8. Proprietors of land shall be at free liberty to transfer, without the previous consent of the Government, or of any other authority, to whomever they may think proper, by sale, gift or otherwise, their proprietary right in the whole or in any part of their zamindáris; such transfers of land shall be valid, and shall be respected by the Courts of Judicature and by the officers of Government; provided they shall not be repugnant to the Muhammadan or to the Hindu laws, or to the regulations of the British Government. But unless such sale, gift or transfer shall have been regularly registered at the office of the Collector, and unless the public assessment shall have been previously determined and fixed on such separated portions of land by the Collector, such sale, gift or transfer shall be of no legal force or effect, nor shall such transaction exempt a zamindár from the payment of any part of the public land-tax assessed on the entire zamindáris previously to such transfer, but the whole zamindáris shall continue to be answerable for the total land-tax, in the same manner as if no such transaction had occurred.

9. Where a part of a zamindáris may be sold for the liquidation of arrear of the public assessment, or for the satisfaction of a decree of a Court of Judicature, or where part of a zamindáris may be transferred by sale, gift or otherwise, the zamindár or landholder shall furnish to the Collector true and correct accounts of the entire zamindáris, and of the portion of the zamindáris about to be separated, for a period of time not less than the three years preceding such sale or transfer, in order that the due proportion of the public revenue may be fixed thereon.

The assessment to be fixed in this case on the separated lands shall always bear the same proportion to the actual value of the separated portion as the total permanent jamá on the zamindáris bears to the actual value of the whole zamindáris.

REGULATION II OF 1803.

17. Collectors shall be held responsible for justly and equitably apportioning the permanent assessment on all subdivisions of estates, and the amount of such assessment shall be regulated at a rate proportionate to the value which such subdivisions of estates bear to the gross assets of the whole estates.

Collectors to be responsible for apportioning assessment on subdivisions;

18. Collectors, at the time they transmit statements of the public assessment so apportioned on subdivisions of estates for the consideration of the Board of Revenue, shall furnish the proprietors of the estates in question with the amount of the assessment so apportioned; and where the proprietors may object and appeal from the assessment proposed by the Collectors for the subdivisions of the said estate, Collectors shall immediately forward the same, with their remarks, to the Board of Revenue.

to furnish proprietors with amount so apportioned. Appeal therefrom to be forwarded to Board.

20. Collectors, on receipt of a decree of a Court of Judicature ordering land paying revenue to Government to be sold, shall proceed to attach a sufficient portion of the said lands to answer the amount of the decree, in such mode as may be prescribed for recovery of arrears of revenue by the regulations, and shall immediately report such attachment to the Board of Revenue.

Attachments of land to be reported to Board.

21. In attaching portions of estates for arrears of revenue, or in consequence of a decree of a Court of Judicature, Collectors shall be careful to form the subdivisions compact, selecting such villages and lands as may be situated contiguously to each other. Collectors shall moreover have, in view the nature of the soil and available resources of the different lands, and shall be careful to include, as nearly as may be practicable, equal portions of land with contracted means of improvement, and of lands with extensive means of improvement.

Rules to be observed in attaching portions of estates.

22. In forming subdivisions of estates, Collectors shall be careful to preserve all the lands watered by one tank or water-course in the same subdivision; and where it may be necessary to deviate from this rule, Collectors shall fully explain such necessity to the Board of Revenue, and wait the orders of the Board on their reference, previously to concluding the arrangement.

In forming subdivisions, lands watered by one tank to be kept in same subdivision.

Registers of transfers of land.

23. Collectors shall keep registers of all subdivisions of estates, and of all transfers of landed property, in a form to be submitted to, and to be approved by, the Board of Revenue.

Register of alienated lands.

24. Collectors shall keep, in a form to be approved by the Board of Revenue, registers of all alienated lands paying revenue to Government, or exempt from the payment of public revenue. The registers shall be kept in the mode and manner prescribed by the Regulations already passed, or to be passed, for that purpose.

MADRAS ACT II OF 1864.

Sale of land for arrears.

44. It shall be lawful for the Collector, or other officer empowered by the Collector in that behalf, to sell the whole or any portion of the land of a defaulter in discharge of arrear of revenue: provided always that, so far as may be practicable, no larger section in the land shall be sold than may be sufficient to discharge the arrears with interest, and expenses of attachment, management and sale.

Apportionment of assessment on subdivision.

45. Where only a part of a landed estate held under a sanad-i-milkīyat-i-istimrār, or otherwise subject to the payment of a lump assessment, may be sold, the assessment upon such part shall be apportioned by the Collector previous to sale in manner following:—

The amount of revenue to be assessed on each division shall bear the same proportion to the actual value of such division as the total amount of the revenue of the whole estate may bear to the total actual value of the entire estate previous to such division.

Production of accounts.

To this end the Collector shall have power to demand from landholders and from the karnams of villages accounts of the produce and of the charges attending the management of lands to be divided; such landholders and karnams shall furnish the said accounts when required for, a period of not less than three years next preceding the then current year; where the landholder may refuse or unreasonably delay to comply with such demand, so as to prevent the assessment being fixed on such divided portions of land, the Collector shall proceed to sell the entire estate.

46. The amount of the permanent land-revenue to be assessed by the Collector on portions of a divided estate held under a sanad-i-milkfyat-i-istimrâr, or otherwise subject to the payment of a lump assessment, shall not be valid until such amount may have been confirmed by the authority of the Board of Revenue signified in writing.

Confirmation of apportionment by Board.

ACT NO. I OF 1876.

(Received the Governor's assent on the 12th February, 1876, and the Governor General's assent on the 3rd March, 1876, and took effect from the 1st September, 1876).

AN ACT TO MAKE BETTER PROVISION FOR THE SEPARATE ASSESSMENT OF ALIENATED PORTIONS OF PERMANENTLY-SETTLED ESTATES.

WHEREAS it is desirable to make better provision for the separate assessment to land revenue of portions of permanently-settled estates alienated by sale or otherwise; it is hereby enacted as follows:—

Preamble.

1. The alienor or alienee of any portion of a permanently-settled estate, or the representative of any such alienor or alienee, may apply to the Collector of the district in which such portion is situate for its registration in the name of the alienee, and for its separate assessment in respect of land-revenue.

Application for registry and separate assessment.

2. The Collector shall thereupon hold an inquiry as to who is the present owner of the property in respect of which the application is made.

Inquiry by Collector.

For the purposes of such inquiry the Collector shall publish a notice in the local Gazette, in three successive issues, that the application has been made, and that, unless cause is shown to the contrary within sixty days from the date of notice, such separate assessment will be made.

Procedure as to inquiry.

He shall also cause notice of the inquiry to be given to any alienor or alienee who has not joined in the application.

If on such inquiry it appears that the alienation has taken place and that all the parties to such alienation concur in applying for the separate assessment of the portion alienated, and if objection is not taken by any person interested in the estate, or being taken is disallowed by the Collector, the Col-

In what case registry and separate assessment should be made.

lector shall proceed to register the alienated portion in the name of the alienee, and to apportion the assessment of such alienated portion in the manner provided in section 45 of Madras Act, II of 1864, subject to the sanction laid down in section 46 of that Act.

Proportion of land-revenue to be deducted.

3. Upon such assessment being declared there shall be deducted from the land-revenue payable in respect of such estate an amount equal to the sum assessed on the portion so separately assessed.

Assessed part not liable for arrears due by estate, nor estate for arrears due by part assessed.

4. Upon such assessment being made, the portion so assessed shall no longer be liable in respect of arrears of revenue due by the estate of which it formed a part; nor shall such estate be liable in respect of the portion so assessed.

Persons aggrieved by registration may sue in Civil Court.

5. Any person aggrieved by the fact of the separate registration of such portion may sue in a Civil Court for a decree declaring that such separate registration ought not to be made.

Persons aggrieved by refusal to register may sue in Civil Court.

6. Any person aggrieved by the Collector's refusal to register may sue in a Civil Court for a decree declaring that such separate registration ought to be made.

Persons aggrieved by assessment may appeal to Revenue Board.

7. Any person aggrieved by the apportionment of the assessment under section 2 of this Act. may appeal to the Board of Revenue within ninety days from the date of the declaration of such assessment; and the order of the Board of Revenue shall be final.

Power to re-adjust assessment.

8. The Governor in Council may at any time, if it appears that there has been fraud or material error in the apportionment of such separate assessment, cause the same to be re-adjusted.

Regulation of 1819 repealed.

9. Regulation I of 1819 is hereby repealed.

The Law of Partition in Bombay BOMBAY ACT V OF 1879.

PARTITION.

113. The following rules shall be enforced at the partition of any estate paying land-revenue to Government (namely) :—

Partition of an estate paying revenue to Government.

(1) When land is sub-divided by the Court, the sub-divisions may be recorded according to the Court's order as plot numbers but the parties themselves are to be left to preserve the boundaries of the new sub-divisions, for which the Government officers are in no way responsible. (G. R. No. 2595, dated 29th May 1872).

(2) The following are orders under which a Surveyor is appointed in each collectorate and who is generally employed in making partitions of estates under the Civil Court's decree.

In each Collectorate a competent and trustworthy Surveyor has been appointed, thoroughly acquainted with the details of all branches of the Revenue Survey, so that a Collector may not be compelled to call on the Superintendent of Survey, after the Survey establishments have left the District, to send Surveyors to do odd pieces of Survey works.

In the division of numbers under decrees of Civil Courts, in the cases of compensation for land taken for railway purposes or public works, and in the correction of Survey maps and papers consequent on these and similar alterations, and in connection with forest reserves, there is generally ample employment for a Surveyor in each Collectorate. But there is nothing to prevent a Collector from employing the Surveyor in any other way in which his services can be utilized, provided that the duty for which he is specially employed receives his first attention. It would therefore add to the value of the Surveyor if he could take levels and make estimates of quantities, or a survey for a clear road; but these qualifications should not be insisted on, and might perhaps be acquired sufficiently after appointment. In general it will not be required that the Surveyor should have a knowledge of English, and in any case an imperfect knowledge of English should be preferred to an imperfect knowledge of Survey work. (G. R. No. 3861, dated 19th October 1868).

The appointment of Huzur Surveyor rests with the Collector of the district and the only condition attached to it is that the Collector's nominee should be a man on the Establishment of a Superintendent of Survey. The Collector must of course refer to the Superintendent but he can make his selection and is not bound to accept any particular individual named by that officer. (G. R. No. 521, dated 23rd January 1892).

(1) the estate shall be divided as far as possible according to survey numbers without sub-dividing any number; but if the partition cannot be completely effected without sub-dividing a number, such sub-division may be made by the Collector, subject to the provision of section 98;

(2) any number, or sub-division of a number, which may remain over after the partition has been carried out, as far as possible, according to the last rule, and which is incapable of sub-division or of further sub-division owing to the provision of section 98, shall be made over to one of the sharers in consideration of his paying to the other sharers the value in money of their shares in the same, or shall be sold and the proceeds divided amongst all the sharers, or otherwise disposed of, as the Collector thinks fit;

(3) the expenses necessarily and properly incurred in making such partition shall be recoverable as a revenue demand in such proportions as the Collector thinks fit from the sharers at whose request it is made, or from the persons interested in such partition.

(1) *Recognition of rights in numbers of less than minimum extent.*—In the division of an estate paying land revenue to Government the Collector is bound by the rules laid down in section 113 of the Land Revenue Code whenever they are applicable. If a Court assigns rights in specified arrears in Survey numbers of less extent than the minima prescribed under section 98 of the Code these rights cannot be registered in the Government accounts, or be otherwise recognized by Government. (G. R. No. 7052, dated 23rd November 1881).

(2) *Partition of Inams under Summary Settlement.*—In cases of Inam land and villages held under the Summary Settlement, the Collector shall be bound to accord separate entry, to the sharers, of their shares,

(a) in every case of partition supported by a deed of consent;

(b) in every case supported by a decree of the Civil Court. (G. R. No. 3483, dated 5th May 1883).

(3) *Of Service Inams.*—Having regard to the decision of the Bombay High Court in *Mancharam v. Panshankar* (I. L. R., 6 Bombay, 298, 1882), there seems no objection to the provisions of section 113 of the Land Revenue Code being extended to the cases of Service Inam lands paying only *Judi* to Government, provided that by the partition effected under the above section there will be no alienation of the property out of the family by which the services for which it was granted are to be performed. (G. R. No. 2457, dated 23rd April 1887).

(4) *Persons entrusted with partition, Travelling expenses of.*—The travelling allowances of the person entrusted with the partition, according to the scale laid down in the High Court's circulars, as also contingent expenses on account of carriage of instruments required in such partition, necessarily and properly incurred, are to be recovered under clause 3 from the parties to the partition. In the first place, however, the parties interested should be called on to provide whatever assistance in the way of carriage or labourers the person entrusted with the partition may require, and in the event of a necessity to employ hired labour the cost thereof with other contingent expenses should be recovered from the parties concerned as a revenue demand. (G. R. No. 5280, dated 11th September 1882).

(5) *Scale of Bhatta to.*—The scale according to which Bhatta is to be allowed to persons entrusted with the partition is as follows:—

For Clerks and Karkuns of Collectors and other officers employed by the Collectors for each day actually on tour.—

	Rs.		Rs.	Rs.
on more than	275	to	500	3 0-0
Do.	250	to	275	2 12-0
Do.	225	to	250	2 8-0
Do.	200	to	225	2 4-0
Do.	175	to	200	2 0-0
Do.	150	to	175	1 12-0
Do.	125	to	150	1 8-0
Do.	100	to	125	1 4-0
Do.	87-8	to	100	1 0-0
Do.	75	to	87-8	0 14-0
Do.	62-8	to	75	0 12-0
Do.	50	to	62-8	0 10-0
Do.	37-8	to	50	0 8-0
Do.	10	to	37-8	0 6-0

For Peons, &c.,—

on more than Rs. 8-00	0 2-0
on Rs. 8 and less	0 1-0

(Vide Bombay Government Gazette, Part I, page 865, 1884).

Disposal of fees paid to Government Servants entrusted with partition. (6) *Classers.*—When classers or other Revenue officers are deputed on a commission under Chapter XXV of the Civil Procedure Code, 1882, the Civil Courts grant them a certain fee for the execution of the said commission. (Vide rule 43 of the High Court civil circular orders published in the Bombay Government Gazette, Part I, page 865, 1884). This fee should be recovered from the classers and the Revenue officers deputed on commission, and credited to Government in return.

for the loss of their services during the time they were engaged in executing the commission. (G. R. No. 7858, dated 28th September 1885).

(7) *Measurers*.—The measurers of the Revenue Survey Department employed on the work of partitioning estates and the peons under them are entitled to travelling allowances under the rules of the Civil Travelling Allowance Code (now Civil Service Regulations) for journeys performed by them in the execution of their duty and such allowances should be paid to them.

The partitions made by these officers are effected under the orders of Civil Courts equally with those effected by surveyors employed on Collector's Establishments and the fees prescribed in section 41 of the High Court Circulars as well as contingent expenses for the carriage of records, instruments, &c., should be recovered from the parties interested in the partitions. (G. R. No. 1765, F. D., dated 21st June 1886).

(8) *Other Government servants*.—Government servants accepting commissions issued by Civil Courts are required to pay into the treasury sums which they may receive as fees for their services. They are, when so engaged, regarded as being on duty and are allowed travelling allowance according to the rules in the Civil Service Regulations, the allowance being drawn in the usual way by presentation of bills in the Treasury. (G. R. No. 2053, J. D., dated 17th April 1890).

(9) *Recovery of fees and other expenses in partition cases*.—*Fees*.—The Collector should see that the extra fee prescribed by rule 41 at page 178 of the High Court circulars is levied in all cases in which partition of an estate is made by the Collector under section 265 of the Civil Procedure Code. (G. R. No. 7230, dated 11th December 1886).

(10) The Commissioners of Divisions should be requested to impress upon the Collectors the duty of seeing that the orders conveyed in G. R. No. 7230, dated 11th December 1886 are properly carried out. (G. R. N. 140, dated 7th January 1887).

(11) *Other expenses*.—The Collector should include the salaries and allowances of Surveyors and peons employed in effecting partitions in the expenses necessarily and properly incurred within the meaning of section 113 (3) of the Land Revenue Code. The charge should be for the time the above officers are actually engaged in the village in which the partition is to be effected, and for a reasonable time for going to, and returning from, that village; but a charge for one and the same day must not be made in more than one case. (G. R. No. 5894, J. D., dated 29th October 1888).

(12) Charges, when incurred, in connection with partition of estates should be debited to Land Revenue, and the recoveries, when made, credited to that head by reduction of expenditure. (G. R. No. 3118, F. D., dated 27th April 1889).

(13) Circular No. 83 at pages 46 and 47 of the High Court's circulars having been cancelled the Governor in Council is pleased to direct that in future the Collectors shall be left free to use their powers under the Bombay Land Revenue Code for the levy of the costs of the partition in execution of a Civil Court's decree of estates paying revenue to Government. • (G. R. No. 1993, J. D., dated 14th April 1890).

114. Whenever any one, or more co-sharers, in a Khoti estate, into which a revenue survey has been introduced, (or in a talukdari estate),* consent to a partition of the said estate, it shall be lawful for the Collector, or for any other officer duly empowered by him in this behalf, subject to the rules contained in the last preceding section, to divide the said estate into shares according to the respective rights of the co-sharers, and to allot such shares to the co-sharers :

Partition of certain estates by Collector on application by co-sharers.

Provided that no such partition shall be made unless

(a) all the co-sharers are agreed as to the extent of their respective rights in the estate, and

(d) the assessment of the share or shares of the sharer or sharers consenting to such partition exceeds one-half of the assessment of the entire estate.

In such cases the expenses of partition shall be recovered under rule (3) of the last preceding section from all the co-sharers in the estate divided.

115. At the time of a revision of survey, it shall be in the discretion of the officer in charge of the survey, subject to the provisions of section 98, and to any departmental rules or orders in this behalf at the time in force, to sub-divide any survey number into two or more distinct numbers, and to enter the names and liabilities of the persons whom he shall deem entitled to be recognized as registered occupants of such sub-divisions in the settlement register separately.

Sub-division of numbers at time of revision of survey.

The object of this section is to enable the officer in charge of the Survey to make, at the Revision Survey, into separate survey Nos., portions of original survey Nos., which may have passed, by purchase, by a decree of the Civil Court or by partition, into the occupation of persons other than the holder of the original survey Nos. provided that the por-

* The words enclosed in brackets have been repealed by section 3 of Bombay Talukdari Act (VI of 1888).

tions to be so made into separate survey Nos. are not of less extent than the minimum fixed under section 98.

Separate de- " 116. When any portion of cultivable land is appropriated
marcation of under the provisions of section 65 or 67 for any non-agricul-
land appro- tural purpose, the portion so appropriated may, with the sanc-
priated under tion of the Collector, be demarcated, and made into a separate
section 65 number at any time, notwithstanding the provisions of sec-
or 67. tion 98.

Bombay 117. Nothing in section 113, 115 or 116 shall effect the
Act V of provisions of Bombay Act V of 1862.*
1862 not
affected.

Bhagdari and Narvadari Tenures Act.

Standing Orders of the Board of Revenue. Madras.

[REVISED STANDING ORDER NO. 28.

The subdivision of survey fields may be permitted for all purposes on the following conditions:—

(1) that the portion to be divided off be durably demarcated in cases of (a) acquisition of land for public purposes, (b) subdivision of holdings under the provisions of the Loans Act, and (c) assignment on patta of portions of unsurveyed blocks and of portions of unassessed waste or poramboke land. In the case of subdivisions due to sale, transfer or relinquishment, demarcation may be made with stones if the parties require it or if the Divisional officer orders it to be done;

(2) that the subdivided portion be separately lettered and numbered in the village accounts;

(3) that it shall be in a single block, not in patches, and be readily accessible from without;

(4) that if the subdivision is for purposes of relinquishment, the portion divided off for relinquishment shall not be less than two acres if dry, and one acre if wet, unless the portion to be relinquished has been destroyed or rendered useless by floods or other causes beyond the ryots' control; and

(5) that if subdivision is for the purpose of obtaining wet remission, the new fields shall in no case be less than one acre in extent, whether the survey field consists of two or more revenue fields clubbed together or not.

No subdivision will be valid till confirmed either by the officer conducting the Jamabandi of the taluk in which the village is situated or the Divisional officer. It will be at the discretion of the Divisional and Jamabandi officer, to refuse to confirm subdivisions in which the above conditions have not been complied with. After registration, the subdivided portion will be treated in all respects as a separate field. Where

Board's Proceedings,
dated 5th December
1893, No. 504
(Settlement),
and 29th November
1894, No. 524

B. P. 7th Sep.
1886, No.
1989.

B. P. 4 Jan.
1886 No. 19.

B. P. 5th
Jan 1886, No.
19 and 18th
Decem. 1886,
No. 2731.

B. P. 27th
January 1890,
No. 54.

B. P. 5th Jan.
1886, No. 19,
25th Feb.
1886, No. 500,
and 7th Sep.
1886, No.
1989.

a ryot occupies a portion of a field under conditions which render its subdivision impossible under the foregoing rules, it is open to the Collector to impose on the portion occupied the assessment fixed on the entire field.

B. P. 24th
May 1876,
No. 1368.
B. P. 5th Dec.
1893, No. 504
(Settlement),
and 10th
Oct 1894 No.
424
(Settlement)
B. P. 29th
Nov. 1894,
No. 524.

2. A record of all subdivisions of survey fields must be kept by the karnam in the field measurement book supplied to him for the purpose. In the case of subdivisions made at the time of settlement or subsequently under proper authority and shown by letters or sub-numbers in the settlement register, the subdivision can be plotted and the measurements copied into the field measurement book from the measurement records wherever these are forthcoming. When they are not available, the karnams must measure the subdivisions and enter their measurements in the field measurement book. In the case of new subdivisions requiring the sanction of the Divisional officer, the karnam will prepare an exact copy of the subdivision sketch and measurements from his field measurement book, and after obtaining the countersignature of the Revenue Inspector of the firka thereto in token of its correctness forward it to the taluk where the copy will be finally recorded after the Divisional officer's sanction has been obtained. The copies should be maintained village war in the Taluk office and preserved with great care and a separate register of them should be maintained. All old records relating to subdivisions must be carefully preserved. Changes due to darkhast or relinquishment which are likely to be only transitory need not be plotted, they may be simply measured up for the purpose of assessing the revenue.

Circular
Order, dated
24th January
1856.

3. The subdivision of fields can best be effected by means of sub-numbers or letters for the subdivisions.

Board's Proceedings, 29th November 1894, No. 524.

119. *Subdivision of joint liability in enfranchised Inams*—The following notification, authorizing to a certain extent, and under certain conditions, the subdivision of the joint liability of shareholders in enfranchised Inams held under joint tenure to the payment of the Government quit-rent should be published from time to time in the District Gazettes:—(1) It is hereby notified for the information of all those whom it may concern,

that in any case in which all the shareholders in an enfranchised joint tenure Inam may agree among themselves to subdivide the benefits derivable from the grant, and the quit-rent payable to Government, (provided, however, that the share of quit-rent thus apportioned and payable by any individual, shall in no case be required to be recognized by the Collector, unless it amounts to two aanas or upwards); and shall produce before the Collector an agreement signed by all of them, and duly stamped and registered, containing a full statement of the details of the subdivision of the land or produce or rent receivable from occupying tenants (as the case may actually be), and declaring the unconditional acceptance by all the shareholders without exception of the above-mentioned agreement; the Collector is prepared to give public notice of the proposal, and should no objection be raised and established, to accept it, so far that each recognized and recorded individual share of the Inam shall be held first liable to sale for the recovery of the Government dues on account of it should the sale of the defaulter's other property have proved insufficient; but that in the event of the Government demand being still unsatisfied, the Collector shall be at liberty to recover the balance outstanding from the rest of the shareholders by the sale of their shares in the Inam concerned, or other property belonging to them, or both. (2) Should objections be raised by competent parties to any proposals that may be made, the Collector will inquire into and dispose of them on their merits."

2. The receipt of proposals made in due form must be notified by proclamation and placard in the village itself and by placard in the Taluq and Huzur cutcherries. The placard and proclamation must declare that the proposal is unanimous; they must also state that the proposal will be disposed of on such and such a date, unless objected to before the Collector within three months.

3. When the Collector has decided to accept the proposal, an order will be issued by him to the taluk authorities detailing and accepting the agreed subdivision of the Inam, in the terms of the notification as above.

4. As each proposal is accepted, notice to that effect must be made in the District Gazette.

5. Collectors will notice in their Annual Settlements Reports the extent to which advantage is taken of the permission here accorded.

G.O., dated 18th October, 1867, No. 2451. R. D.; 3rd April, 1868; G.O., 6th December, 1870, No. 1950, Revenue. Board's Proceedings, No. 647, dated 10-2-71. Board's Proceedings No. 98, dated 2-3-93 (Land Revenue).

120. Assessment on subdivisions of enfranchised Inams.—The apportionment of Jodi or quit-rent on the subdivisions of enfranchised Inams should be made at rates proportionate to the values of such subdivisions in comparison with the value of the whole Inam. In cases where the subdivisions are small, redemption of the quit-rent should be encouraged.

2. No separate deed need be given for each subdivision of an Inam sold or purchased. The deeds executed by the seller must constitute the purchaser's title, as in the case of any other property. When persons appear before the Revenue authorities for apportionment of the quit-rent, the portion sold will be deducted from the original title-deed given by the Inam Commissioner for the entire Inam, by an endorsement on the back of it under the signature of the Collector, or one of his Assistants or Deputies. The purchaser may take an extract from the Collector's Register in which the transfer is recorded, as in the case of ordinary ryotwari land.

3. The Act for the Registration of Assurances will afford additional means of securing title.

G.O., 1st October, 1864, No. 1820, R. D.; 28th October, 1864.

GLOSSARY OF SOME INDIAN TERMS IN CONNECTION WITH THE SUBJECT OF THESE LECTURES.

Abibhacta—Joint.

Angsanamah—Deed of partition.

Batwarah—Partition.

Bivacta or *Bibhacta*—Divided or separated.

Bivāg—Division.

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